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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARIANO LETTIERI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an exercise of this Court's supervisory power is appropriate where the federal appellate court has, in effect, sanctioned trial tactics wherein the United States Attorney improperly attacked the defendant's credibility with baseless accusations of unrelated criminal conduct, inflammatory argument, and improper references to evidence not submitted, while it improperly bolstered the credibility of its own witness by misrepresenting to the jury that its witness could get thirty years if the trial judge deems his testimony untruthful.

II. Whether the Seventh Circuit erred in holding that it was not required to reverse the defendant's conviction unless the prosecutors' misconduct was so egregious that the jury would have returned a different verdict absent such conduct.

III. Whether the defendant's due process and confrontation rights were violated where his sixteen-year sentence was based on the hearsay proffer of an unavailable and unreliable witness.

IV. Whether the defendant was denied the effective assistance of counsel by his attorney's failure to object to inadmissible hearsay, baseless accusations of unrelated criminal conduct, and inflammatory arguments ridiculing the defendant's trial defense.

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PRAYER

Petitioner Mariano Lettieri respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 983 F.2d 1443 (7th Cir. 1993), and is attached hereto at Appendix A.

JURISDICTION

On January 21, 1993, the United States Court of Appeals for the Seventh Circuit affirmed the petitioner's conviction and sentence of 190 month's incarceration. *See* Appendix A. On February 4, 1993, the petitioner filed a Petition For Rehearing with Suggestion For Rehearing En Banc. The rehearing petition was denied on February 26, 1993. *See* Appendix B. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person shall . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . ."

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

On January 2, 1990, Defendant-Appellant Mariano ("Mario") Lettieri was charged in a second superseding indictment, along with eight other defendants, with conspiracy to possess and distribute heroin and cocaine. The United States District Court for the Northern District of Illinois had jurisdiction over the offense pursuant to 21 U.S.C. § 841(a).

The only evidence directly linking Lettieri to illegal conduct was the testimony of two indicted co-defendants, Michael Gomire and Howard Lucas. Michael "Ice Mike" Gomire sold cocaine around the clock from numerous apartments which he rented in the Washington Pine Apartments on the west side of Chicago. Gomire employed a crew of approximately fifteen people including Lucas who helped break up kilos of cocaine into dime bags, which were sold by Gomire and others. Other Gomire employees helped provide security for the drug operation.

Mario Lettieri was the founder and operator of Mario's Butcher and Liquor Shop (the "Butchershop"), one of the most successful businesses on the economically depressed west side of Chicago, just a few blocks away from Gomire's operation. Gomire testified that he met Lettieri through Nedrick Miller, the owner of the Washington Pine Apartments, and that Miller told Gomire that Lettieri wanted to provide the drug operation with a kilo of cocaine on consignment. Shortly thereafter, Gomire stated that Miller had a kilo of cocaine at his apartment and told Gomire that the drugs came from Mario. Defense counsel did not object to this hearsay testimony. Gomire testified that he sold the cocaine and later he and Miller delivered $29,000 to Lettieri at the Butchershop, which was the agreed upon consignment price.

Gomire further testified that he and Miller went to Lettieri's Butchershop one other time in the summer of 1988 to ask for more cocaine. Gomire stated that, all together, he and Miller received three or four kilograms of cocaine from Lettieri, all on consignment and all at the same price of $29,000. Although Gomire stated that he and his crew sold approximately one kilogram of cocaine every week and a half, Gomire could not remember the name, address, or telephone number of any of his sources except for Let-

tieri. On cross examination, however, Gomire stated, "I did not know [Lettieri] personally. All I know is I was selling cocaine for him and Rick Miller."

Howard Lucas testified about three occasions in which Lettieri supplied drugs to the operation. On one occasion, Lucas met with Lettieri at a restaurant and later discovered a package containing a kilogram of cocaine in the trunk of his car. On another occasion, Lucas testified that he acted as a "lookout" for a transaction and that he later learned from Miller that Lettieri had sold him a kilogram of cocaine for $32,000.

Lucas also testified that in the summer of 1988, he was sent to Lettieri's Butchershop to pick up two ounces of heroin. Lucas stated that he went in the back door of the Butchershop and went down to the basement, where Lettieri retrieved the heroin from above one of the two basement boilers and gave it to Lucas. Lucas stated that on his way back home he used some of the heroin and took out two or three grams for his personal use.

Gomire received a five year sentence in exchange for his testimony against Lettieri. The government also allowed Gomire to remain free on bond during Lettieri's trial even though, prior to the trial, Gomire shot three people and was charged with several new felonies. Gomire was taken into custody after Lettieri's conviction and subsequently pled guilty to the attempted murder charge which arose out of the shooting incident. Gomire was also a heroin addict until he was taken into custody two months after Lettieri's trial. At a post-trial hearing, Gomire admitted using heroin while he was on bond and cooperating with Lettieri's prosecutors. Howard Lucas was also a heroin addict. He received a sentence of probation as a reward for his assistance in the prosecution of Lettieri.

A third witness implicated Lettieri entirely through hearsay evidence. Annette Daggs, the building manager at the Washington Pine Apartments, stated that on two occasions in 1988, she observed Nedrick Miller with a case full of cash that Miller told her was "for Mario." Defense counsel did not object to this hearsay testimony linking Lettieri to the illegal operation.

Lettieri testified about the origins of his business and about how he built his Butchershop into a highly successful operation, grossing more than four million dollars over the previous three years. Lettieri stated that he knew Howard Lucas who often came in the store. Lettieri said that he did not know Gomire although he had seen him in the store once or twice and knew that he was called "Ice Mike". Lettieri denied all involvement in drug dealing and stated that he was "against drugs."

On cross-examination, the prosecutor made repeated and persistent insinuations of prior bad acts, wholly unrelated to the present charge. First, the prosecutor questioned Lettieri about an eleven-year old misdemeanor theft charge for which he was placed on one-year supervision. The colloquy between Lettieri and the prosecutor was as follows:

Q: Mr. Lettieri, you indicated that you are anti-drugs, is that correct, sir?

A: Yes, I am, sir.

Q: Are you also against thievery?

A: Thievery?

Q: Yes, sir.

A: What do you mean by that?

Q: Well, are you against people who steal things?

A: Yes. Probably. Yes, I am.

. . .

Q: Isn't it true, sir, that you were not only arrested, but convicted of delivering a stolen computer in 1979?

A: Can I explain that, sir? Can I explain?

Q: Can you answer that question yes or no?

. . .

A: That was reduced to a misdemeanor and I got one year supervision.

Q: Sir, answer the question, if you can.

A: Okay. Yes. Yes.

Q: You were not only charged with that—it as a felony charge—but you pled guilty to doing what the State's Attorney's Office charged you with, isn't that correct, Sir?

A: Yes.

Q: That was delivering a stolen microcomputer?

A: I didn't deliver anything.

Q: Well, that's what you're charged with.

A: Right. If you would let me explain what happened, the reason why?

Q: Well, your answer is yes, plead [sic] to that offense?

A: I guess I have to say "yes."

Q: Now, sir, that was not the first time, or the last time that you were involved in delivering or selling stolen goods, isn't that right, sir?

A: When was the second time?

Q: Well, what is your answer, yes or no?

A: I would have to say "no."

Q: So, that was the last time, in the late 70's, when you were involved in delivering a stolen piece of merchandise, is that correct?

A: I guess so. 1970, yes.

Prior to trial, defense counsel filed a Motion in Limine which argued that the more than ten-year-old misdemeanor case is inadmissible under the Federal Rules of Evidence and unduly prejudicial. However, defense counsel did not object to the prosecutor's questions on cross examination and the record does not reflect a ruling on the written Motion in Limine.

The prosecutor then accused Lettieri of dealing in stolen goods. Although Lettieri denied the allegation, the prosecutor persisted. The entire interrogation spans more than two full pages of the trial transcript. This colloquy between Lettieri and the prosecutor began as follows:

Q: Well, isn't it true, sir, that you were dealing in stolen goods with Mr. Miller?

A: I was dealing with stolen goods with Mr. Miller? Could you rephrase that question, please.

Q: Isn't it true that you were dealing in stolen goods, in addition to drugs, with Mr. Miller?

A: No, sir.

Q: Well, sir, isn't it true that in the middle of March of 1989, Mr. Miller advised you that about $56,000 worth of jewelry and that type of thing—money—had been stolen out of his apartment?

A: Mr. Miller called me the day that he got robbed—which you have a transcript and a tape, if you want to play it—called me up at work saying, "Did you send somebody here, motherfucker, to rob me?" He was, I guess, joking. I said, "What's going on? What are you talking about?" He said: "Well, if anybody comes to your store trying to sell you a ring, a gold bracelet watch" this and that "let me know or hold him." Being on the west side of Chicago, you know that people are always trying to sell something, all day long.

Q: And you buy it, isn't that right?

A: No, I don't.

Q: Isn't it true that you buy stolen cameras, stolen VCRs?

A: No, I don't.

The Seventh Circuit agreed that this line of questioning was improper. "No evidence in the record supports an inference that Lettieri and Miller dealt in stolen goods. No proper justification existed for admission to this line of questioning." *United States v. Badger*, 983 F.2d 1443, 1454 (7th Cir. 1993).

Next, the prosecutor accused Lettieri of dealing drugs for an individual not connected to the case. The colloquy between the prosecutor and Lettieri went as follows:

Q: Now, do you know a person by the name of John Latham?

A: No, I don't, sir.

Q: Did you ever sell drugs for Mr. Latham?

A: No, I don't.

Here again, the prosecutor had no basis for this accusation yet defense counsel issued no objection.

Next, the prosecutor demanded that Lettieri produce a photograph depicting the boiler room of his store, knowing that Lettieri had no such photograph. The defendant and several employees of the Butchershop had testified that the store has no basement, but only a boiler room with one boiler, thus contradicting Lucas' allegation that Lettieri had retrieved drugs from above one of the two boilers located in the basement of his store. The colloquy between the prosecutor and Lettieri went as follows:

Q: By the way, would you mind getting us a picture of your basement or boiler room?

A: Get you a picture?

Q: Yes. Why don't you go ahead and get it. Go over there and get the picture.

The Court sustained defense counsel's objection to this line of questioning. The prosecutor was undeterred and continued on the subject of the boiler room/basement:

Q: Now, Mr. Lettieri, you know how important the denial of calling this boiler room a basement is to your case, don't you?

A: All I know is that I never met Howard Looker (sic) in a boiler room or a basement, so . . .

In concluding his cross-examination of Lettieri, the prosecutor made a direct suggestion to the jury that Lettieri's accusers should be believed over Lettieri because they had pled guilty. The colloquy between the prosecutor and Lettieri went as follows:

Q: Mr. Lettieri, you're saying that Michael Gomire and Howard Lucas are lying when they say they picked up narcotics from you, is that correct, sir?

DEFENSE COUNSEL: Objection, your Honor.

THE COURT: That he may answer. Overruled.

A: Evidently they are, yes, sir.

Q: Now, sir, you understand that they have pled guilty in this case, don't you?

A: Yes. From what I understand, they pled guilty to the case.

Q: Who's got a greater interest in this case at this time, sir?

DEFENSE COUNSEL: Objection, your Honor.

THE COURT: Sustained.

PROSECUTOR: I have no additional questions, your Honor.

In closing argument, the government again made reference to its witnesses' guilty pleas as evidence that they should be believed over Lettieri:

> Howard Lucas, an individual who has been using drugs since he has been 15 and he is 42 now; the guy is a pathetic creature for sure. He has come in and he has pled guilty before Judge Plunkett and he has exposed himself to over 30 years incarceration, and he could get that; he could get 30 years incarceration if Judge Plunkett deems his testimony untruthful.

The prosecutor also referred again to Lettieri's failure to produce a photograph of the boiler room/basement even though the Court had sustained the objection to the government's prior reference:

> All the 17 different photographs that [defense counsel] was showing you, not one of the boiler room. He said, "why didn't the government have any?" Well, we didn't have a search warrant to get in there. Why didn't he come up with a photograph to show us that we were wrong? Because he knew that there undoubtably is a water heater or something like that right next to the boiler room.

Again, defense counsel issued no objection.

Much of the government's rebuttal argument was devoted to ridiculing Lettieri's trial defense, as demonstrated by the following passage:

> What about Mario Lettieri in this case? We know that Mr. Lettieri is probably the most desperate of all the defendants in this case. Why do I say that? I say that because of the defense he put on, the contrived defense.
>
> . . .

> If we look back on the boiler room or basement testimony, that is probably the most contrived defense, the most calculated defense, I've ever seen.

Here again, defense counsel did not object.

The prosecutor's final words to the jury were:

> By your verdict of guilty you send a message, not just to these individuals but to all individuals who are out there thinking of doing the same thing.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Sustained. That argument is stricken. Don't make that argument, Mr. Mullen.
>
> PROSECUTOR: Ladies and gentlemen, by your verdict of guilty you make these people answer to the law and make them answer to you. Thank you very much.

On May 31, 1990, the jury found Lettieri guilty of conspiracy to possess and distribute illegal drugs. Lettieri was sentenced on November 16, 1990, pursuant to the federal sentencing guidelines. Over objection by defense counsel, the Court determined Lettieri's base offense level, not from the evidence presented at trial, but from a hearsay proffer offered by the government. The government presented DEA Agent John Riley who testified about two interviews with Nedrick Miller. In the first interview, Miller stated that he had heard that Lettieri was a drug dealer but Miller had never bought any drugs from Lettieri. However, in the second interview, Riley testified that Miller stated that he purchased a total of thirty-six kilograms of cocaine from Lettieri. The sentencing court accepted the government's proffer and used the thirty-six kilogram figure to calculate Lettieri's sixteen-year sentence under the federal sentencing guidelines.

On appeal, Lettieri argued that the repeated acts of prosecutorial misconduct denied him a fair trial. The Seventh Circuit agreed that the federal prosecutor's tactics were improper but refused to reverse Lettieri's conviction. The Court stated: "We do not condone this behavior, but we do not believe that the prosecutor's actions were so egregious that the jury would have returned a different verdict absent such conduct." *United States v. Badger*, 983 F.2d 1443, 1456 (7th Cir. 1993). The Appellate Court also rejected Lettieri's claim that his trial attorney's failure to object to the improper tactics of the prosecutors, and to damaging hearsay, rendered his representation constitutionally defective. Finally, the Seventh Circuit rejected Lettieri's claim of error in the sentencing procedure challenging the use of hearsay to determine his sentence under the Guidelines. Lettieri now seeks review in this Honorable Court.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO OVERTURN THE OUTRAGEOUS DECISION OF THE SEVENTH CIRCUIT SANCTIONING THE USE OF REPEATED, FLAGRANT AND ESCALATING PROSECUTORIAL MISCONDUCT TO OBTAIN A CRIMINAL CONVICTION.

In affirming Mario Lettieri's conviction, the Seventh Circuit has effectively ratified dirty pool as an acceptable means to secure criminal convictions and unduly harsh sentences. The federal prosecutors used every trick in the book to convict Lettieri. Recognizing that to convict Lettieri the jury must find him less credible than his accusers, the government set about to destroy Lettieri's

credibility without regard for the rules of fair play. Throughout the trial, the prosecutors improperly demeaned Lettieri's credibility with baseless accusations of unrelated criminal conduct, inflammatory argument, and improper references to evidence not submitted. The Seventh Circuit admits that such tactics were improper yet decides to accept them here. While the Court professes that it "do[es] not condone this behavior"[1] by the federal prosecutors, its opinion has in fact officially sanctioned these tactics.

Incredibly, the tone of the Seventh Circuit opinion reflects apparent amusement at the persistence and tenacity of the federal prosecutors in seeking the conviction of accused drug supplier Mario Lettieri. For example, the prosecutor committed flagrant misconduct during his cross examination of the defendant by demanding that Lettieri "go over there [to counsel table] and get the picture" of his boiler room, knowing that Lettieri had no such picture. The government may not refer to items not in evidence or suggest that such items support its case. *United States v. Stillwell*, 900 F.2d 1104, 1112 (7th Cir.), *cert. denied*, 498 U.S. 838 (1990). The district court properly sustained an objection to this line of questioning. The prosecutor, however, ignored the court's ruling, and, during closing argument, directly argued to the jury that Lettieri did not produce this evidence because "he knew" it supported the government's case. The Seventh Circuit writes:

> Apparently unwilling to say uncle, during closing argument the prosecutor again brought up the "boiler" testimony. . . . We interpret this revisit to the "boiler" testimony as an inartful attempt by the prosecutor to emphasize how the burden had been fulfilled, allowing the jury to find Lettieri guilty beyond

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[1] *United States v. Badger*, 983 F.2d 1443, 1456 (7th Cir. 1993).

> a reasonable doubt. Unfortunately the prosecutor chose to do this by inferring that items not in evidence supported his case.

United States v. Badger, 983 F.2d 1443, 1455 (7th Cir. 1993).

Rather than expressing outrage at the federal prosecutor's flagrant disregard for Lettieri's presumption of innocence and right to remain silent, the Court below characterizes the conduct of the prosecutor as "inartful" and "unfortunate." Also, in response to Lettieri's complaint that the prosecutor committed gross misconduct by summoning up his own experience to tell the jury that Lettieri's defense is the most contrived "I've ever seen," the Seventh Circuit erroneously states that "[t]he transcript reveals no such statement by the prosecutor." *Id.*, 983 F.2d at 1456 n.10. Nowhere in the Seventh Circuit opinion does the Court suggest that sanctions or any other measures be taken to curb these prosecutorial abuses.

Under such circumstances, an exercise of this Court's supervisory power is necessary to protect the rights of an individual defendant and to preserve the integrity of the federal courts. This Court has stated that it may use its supervisory power to "implement a remedy for violation of recognized rights, [and] to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury . . . ." *United States v. Hasting*, 461 U.S. 499, 505 (1983) (citations omitted). In *United States v. McNabb*, 318 U.S. 332, 340 (1942), this Court stated:

> Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

Similarly, in *United States v. Berger*, 295 U.S. 78 (1934), the federal prosecutor used improper tactics to secure the conviction of an accused counterfeiter. In reversing the conviction, this Court found:

> That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of the criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouth of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner.
>
> . . .
>
> The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury.

Id., 295 U.S. at 84-5.

The appellate court affirmed Berger's conviction finding that "the conduct of the prosecuting attorney, although to be condemned, was not sufficiently grave to affect the fairness of the trial." *Id.*, 295 U.S. at 80. This Court reversed Berger's conviction finding it impossible to say that the prosecutor's misconduct did not have an "evil influence upon the jury". *Id.*, 295 U.S. at 85. This Court further commented on the proper role and obligations of a federal prosecutor, a comment which is particularly applicable here:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Id., 295 U.S. at 88.

As with Lettieri, the case against Berger depended upon the testimony of an alleged accomplice with a long criminal record. This Court held, in *Berger*:

> In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt "overwhelming," a different conclusion might be reached.
>
> . . .

> Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded.

Id., 295 U.S. at 89.

Even a man accused of supplying narcotics has a right to a fair trial. Prosecution witnesses do occasionally tell tales about another person of greater interest to the government than themselves in expectation of leniency.

> As Justice Jackson once wrote, "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers." *Krulewitch v. United States*, 336 U.S. 440, 457, 69 S.Ct. 716, 725, 93 L.Ed. 790 (1949) (Jackson, J., concurring). This is especially true where the conviction is for a narcotics violation at a time when the country is engaged in a "war on drugs." However, a courtroom is not the proper place in which to fight such a "war." A defendant charged with a narcotics violation is presumed like every other defendant to be innocent until proven guilty beyond a reasonable doubt after a fair trial.

United States v. Edwardo-Franco, 885 F.2d 1005, 1011 (2nd Cir. 1989).

Mario Lettieri, like every other individual who stands accused of a crime, was entitled to a fair trial and to the presumption of innocence. He was denied these fundamental rights due to the outrageous behavior of his prosecutors. This Court should exercise its supervisory power and, in the interests of justice, order Lettieri a new trial.

II.

THE RULING BY THE SEVENTH CIRCUIT, THAT THE PROSECUTOR'S MISCONDUCT MUST BE SO EGREGIOUS THAT THE JURY WOULD HAVE RETURNED A DIFFERENT VERDICT, CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF EVERY OTHER CIRCUIT.

Notably absent from the opinion of the Seventh Circuit is a finding that Lettieri received a fair trial. Nor does the lower court find that the prosecutor's persistent and escalating attacks upon Lettieri did not prejudice him in the eyes of the jury or reduce his chances for acquittal. Rather, in a break with all prior precedent, the Seventh Circuit held that it was required to reverse only if it found "that the prosecutors' actions were so egregious that the jury *would have returned a different verdict* absent such conduct." *United States v. Badger*, 983 F.2d at 1456 (emphasis added). Only by inventing this insurmountable and unintelligible standard of review was the Seventh Circuit able to save this conviction. No other appellant in any federal court has ever been required to make such a showing on direct appeal of a criminal conviction.

Because the level of scrutiny applied to Lettieri's direct appeal is in conflict with the decisions of this Court and with every other circuit, this Court should grant review. In *United States v. Berger*, 295 U.S. 78, 89 (1934), this Court held that pronounced and persistent prosecutorial misconduct with a probable cumulative effect on the jury deprives a defendant of fair trial and requires reversal where the evidence of guilt is not overwhelming. Thus, under *Berger*, if the numerous incidents of prosecutorial misconduct at Lettieri's trial deprived the defendant of his constitutional right to a fair and impartial trial, he must be awarded a new trial.

A single act of misconduct, which rises to the level of constitutional error, must be proven harmless beyond a reasonable doubt. *United States v. Hasting*, 461 U.S. 499, 510-11 (1983); *Chapman v. California*, 386 U.S. 18, 24 (1967). In *Hasting*, the prosecutor committed constitutional error by commenting on the defendant's failure to rebut crucial evidence. This Court held that reversal is mandated unless it is clear beyond a reasonable doubt that, absent the error, the jury would have returned a guilty verdict. *Hasting*, 461 U.S. at 510-11. *See also United States v. Doe*, 903 F.2d 16, 27-28 (D.C. Cir. 1990) (reversal required where prosecutor's argument referring to take-over of local cocaine market by Jamaicans could not be deemed harmless beyond a reasonable doubt).

Lettieri's prosecutors' conduct in demanding that the defendant produce a photograph which he did not have and later arguing to the jury that the absence of this evidence supports the government's case violated Lettieri's Fifth Amendment right to remain silent and to be presumed innocent. The presence in the record of this error alone mandated strict scrutiny on appellate review.

For less significant incidents of prosecutorial misconduct, most courts apply some form of harmless error analysis; i.e. whether it is more likely than not that the error affected the jury's verdict. *United States v. Simtob*, 901 F.2d 799, 805 (9th Cir. 1990); *United States v. Martinez-Nava*, 838 F.2d 411 (10th Cir. 1988). Other courts look at whether the cumulative effect of misconduct may have prejudiced substantial rights of the accused. *United States v. Lopez*, 898 F.2d 1505 (11th Cir. 1990); *United States v. Dougherty*, 810 F.2d 763 (8th Cir. 1987).

Under either of the above standards of review, reversal of Lettieri's conviction is required. In fact, many courts have found that the potential prejudice of a single episode

of prosecutorial overreaching requires reversal where the evidence of guilt is not overwhelming. For example, in *United States v. Smith*, 962 F.2d 923 (9th Cir. 1992), the prosecutor argued to the jury, in response to defense counsel's attack upon the credibility of a government witness, that the witness could not just get up and say whatever he wanted to because he would be prosecuted for perjury. The Ninth Circuit reversed the defendant's drug conviction finding that the prosecutor's improper vouching for the witness was plain error. The Court held:

> Where the determination of a defendant's guilt or innocence hinges almost entirely on the credibility of a key prosecution witness, allowing a conviction to be obtained by a prosecutor's deliberately vouching for that witness on behalf of the court would pose a clear threat to the integrity of judicial proceedings. That particular form of vouching goes beyond the mere proffer of an institutional warranty of truthfulness; rather, it casts the court as an active, albeit silent, partner in the prosecutorial enterprise. In doing so, it strikes at two principles that lie at the core of our system of criminal justice. The first of these is that "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary. . ." *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 402, 39 L.Ed. 481 (1895). The second, long elevated to constitutional significance because it is so closely intertwined with the first, is that "to perform its high function in the best way 'justice must satisfy the appearance of justice.' " *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954)). If the prosecution may invoke the court as the guarantor of its truthfulness when the veracity of its star witness is challenged and can then survive review for plain error, both the actual likelihood and the perception that an accused will receive a fair

> trial—a trial in which he is presumed innocent and in which the government must prove every element of the charge against him beyond a reasonable doubt—are severely diminished. That result is untenable. Smith's conviction is accordingly reversed for plain error.

Id., 962 F.2d at 936.

As in *Smith*, Lettieri's prosecutors improperly invoked the trial judge as a guarantor of the truthfulness of their witness when it represented to the jury, during closing argument, that Howard Lucas "could get 30 years incarceration if Judge Plunkett deems his testimony untruthful." This remark followed the prosecutor's direct suggestion to the jury, during cross examination of the defendant, that Lettieri's accusers must be deemed more credible than Lettieri because they pled guilty and therefore Lettieri has "a greater interest in this case at this time." These remarks, together with the other improper attacks upon Lettieri's credibility, certainly had an evil influence upon the jury which cannot fairly be ignored. Under any proper harmless error analysis, Lettieri's conviction could not be upheld in light of the egregiousness of the misconduct and the suspect nature of the proof against him.

Lettieri's fate depended upon his credibility in the eyes of the jury. If the jury had believed the defendant's testimony it would have had to acquit him. It might have done so but for the improper destruction of his credibility by the prosecution.

The only witnesses implicating Lettieri in illegal activity were Howard Lucas and Michael Gomire, both indicted co-conspirators testifying pursuant to generous plea agreements. The record of these proceedings reveals serious doubts as to the credibility of Gomire and Lucas. Both

Gomire and Lucas were admitted heroin addicts, although Gomire falsely testified that he was not using heroin at the time of the trial. Gomire also committed an attempted murder while on bond waiting to testify against Lettieri, a crime for which his bond was never revoked.

Following the trial, Lettieri filed a Motion For New Trial based upon the fact that Gomire had signed an affidavit admitting that his testimony against Lettieri was fabricated. However, at the hearing on the motion, Gomire recanted his recantation. The district court denied the Motion For New Trial but acknowledged that the evidence presented improved Lettieri's chances on appeal.

The record of this post-trial hearing provides a further reason to doubt the trial testimony of Gomire and Lucas. At this hearing, the government called Gomire's girlfriend, Lisa Donahue, to testify against Lettieri. On cross-examination, however, Donahue dramatically recanted much of her testimony against Lettieri when confronted with a secretly recorded conversation between she and Lettieri. Here we have direct evidence that a witness who cooperated with the government and testified against Lettieri committed perjury. Thus, whatever arrangements the government made with Lettieri's accusers did not dissuade them from committing perjury to further the cause. In fact, a more cynical mind might say that the government unwittingly encouraged its witnesses to commit perjury by their overzealous approach to the prosecution of Mario Lettieri.

III.

THE SEVENTH CIRCUIT'S RULING THAT THE DEFENDANT HAD NO RIGHT TO CONFRONT OR CHALLENGE THE EVIDENCE UPON WHICH HIS SENTENCE WAS BASED CONFLICTS WITH THE WELL ESTABLISHED CONSTITUTIONAL PRINCIPLES OF DUE PROCESS AND THE RIGHT TO CONFRONT ONE'S ACCUSERS.

This Court has held that a criminal defendant has a due process right to be sentenced only upon accurate and reliable information in a proceeding that accords with standards of fundamental fairness. *United States v. Tucker*, 404 U.S. 443 (1972). It is conceded that the district court may consider hearsay at sentencing. However, the court must first find that the hearsay "has sufficient indicia of reliability to support its probable accuracy." United States Sentencing Guidelines § 6A1.3(a). *See also United States v. Guerrero*, 894 F.2d 261, 266 (7th Cir. 1990) ("Sentencing courts are obliged to use fair procedures to determine the accuracy of the information considered in sentencing.")

The above standards were clearly disregarded during Lettieri's sentencing. Mario Lettieri's sixteen-year sentence was determined from the hearsay proffer of Nedrick Miller wherein Miller told a DEA agent that Lettieri had supplied thirty-six kilograms of cocaine. Miller was not available to the defense as he had not yet been sentenced and would have taken the Fifth Amendment if called to testify for the defendant. Accordingly, Lettieri's counsel objected to the use of this evidence and argued that Miller himself should be required to take the stand thus providing an opportunity for cross examination. This objection was overruled.

In addition to failing to provide for the cross-examination of Miller, the record reveals that Miller's hearsay proffer was unreliable and an improper basis for sentenc-

ing under the federal guidelines. Miller's proffer conflicts not only with the trial evidence[2] but also with Miller's own prior statements in which he said he never obtained drugs from Lettieri. In fact, the Assistant United States Attorney admitted, at Lettieri's sentencing, that one of the reasons the government never called Miller as a trial witness was that "he was not completely candid with the government . . . ."

Thus, not only was unreliable hearsay admitted at the sentencing which the defendant had no opportunity to challenge, but the disputed evidence here was offered to prove the single most critical factor in determining the length of a convicted drug offender's sentence under the sentencing guidelines—the quantity of drugs involved in the offense. Counsel is aware of no decision of any court which accepts the use of hearsay evidence for this purpose under circumstances where (1) the hearsay declarant is considered too unreliable by the government to be called at trial; (2) the hearsay declarant is unavailable to be cross-examined by the defendant; (3) the hearsay statements are directly refuted by the defendant; (4) the hearsay statements contradict the trial testimony; and (5) the use of the hearsay caused at least a three year increase in the length of the defendant's sentence. For these reasons, the use of this evidence was an abuse of discretion, violated Lettieri's right to be sentenced only on reliable evidence and justifies review by this Court.

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[2] At trial, Michael Gomire, Lettieri's primary accuser, testified that Lettieri supplied a total of three or four kilograms of cocaine to the operation. Howard Lucas, Lettieri's other accuser, testified that he had knowledge of Lettieri supplying only two kilograms of cocaine.

IV.

THE SEVENTH CIRCUIT'S FINDING THAT TRIAL COUNSEL WAS NOT CONSTITUTIONALLY INADEQUATE FOR FAILING TO OBJECT TO THE REPEATED IMPROPER ATTACKS UPON THE DEFENDANT AS WELL AS OTHER DAMAGING EVIDENCE IMPROPERLY ADMITTED, CONFLICTS WITH THE PRINCIPLES ANNOUNCED IN *STRICKLAND v. WASHINGTON.*

Lettieri was represented at trial by two attorneys. One of these attorneys almost never objected to prosecutorial abuses, allowing a great deal of improper and prejudicial evidence and accusations to reach the jury. As a result of counsel's failure to raise objections, the jury was permitted to hear the following testimony and argument, all highly prejudicial to Lettieri: (a) inadmissible and highly damaging hearsay testimony; (b) baseless accusations of unrelated criminal conduct; (c) improper suggestions that evidence not submitted provided additional grounds for conviction; and (d) inflammatory arguments ridiculing the defendant's trial defense.

The Seventh Circuit rejected Lettieri's claim of ineffective assistance because the "record shows many motions in limine filed on Lettieri's behalf, as well as many objections made throughout the trial." *United States v. Badger*, 983 F.2d at 1459. However, the fact that defense counsel did raise some objections makes counsel's failure to object to the above items even more prejudicial to the defendant. Because Lettieri's attorneys did sometimes object, the jury was led to believe that evidence and argument not objected to was true and proper. For example, defendant was particularly prejudiced by the prosecutor's persistent attempt, during cross examination, to get the defendant to admit that he was a thief, a dealer in stolen goods, and that he sold drugs for an individual unrelated to the case and unknown to the jury. By not objecting,

defense counsel signaled to the jury that the government had a proper basis for making these accusations and that they were in fact true. If defense counsel had never objected, the jury would have been less likely to make such an assumption.

Defense counsel's failure to make a single hearsay objection was also extremely damaging. The prosecution made full use of Annette Daggs' testimony, that Rick Miller told her a case full of cash was "for Mario," both during cross examination of the defendant and in closing argument. Gomire also gave damaging hearsay testimony when he stated that Miller told him that a kilogram of cocaine came from Mario. Neither of these statements were admissible under the co-conspirator exception to the hearsay rule because they did not further the conspiracy. *See United States v. Bibbero*, 749 F.2d 581, 583-84 (9th Cir. 1984) (hearsay declarant was merely informing witness "of the marijuana's ownership without any intent to further the conspiracy"). Had counsel properly objected, the jury would not have heard this prejudicial evidence and the prosecutor could not have argued that this testimony proved Lettieri's connection to the illegal operation.

The above demonstrations of defense counsel's failures illustrates that the handling of Lettieri's defense fell "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Under *Strickland*, Lettieri's conviction must be set aside if "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.*, 466 U.S. at 695. The facts of this case suggest that the jurors might have had a reasonable doubt respecting Lettieri's guilt had his attorneys properly prevented the prosecutors' misconduct.

As set forth more completely in the preceding sections of this Petition, the evidence against Lettieri was far from overwhelming and his case turned entirely on credibility. The jury found Lettieri guilty because, thanks to prosecutorial chicanery, it erroneously found the government witnesses Gomire and Lucas more credible than the defendant and his witnesses. Defense counsel's failure to object allowed the government to improperly demean Lettieri's credibility in the eyes of the jury, with unfounded accusations and inflammatory argument, while it improperly vouched for the credibility of its own witnesses. It cannot fairly be said that the failure of Lettieri's trial counsel to object to improper evidence and argument did not prejudice Lettieri before the jury and reduce his chance for an acquittal.

CONCLUSION

Wherefore, Petitioner Mariano Lettieri respectfully prays that this Honorable Court grant this petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 90-3223, 90-3245, 90-3252,
90-3659, 91-2460

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JAMES BADGER, ROSCOE FOREMAN,
MARCIA F. IVY, and MARIANO "MARIO"
LETTIERI,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 CR 364—**Paul E. Plunkett,** *Judge.*

ARGUED SEPTEMBER 11, 1992—DECIDED JANUARY 21, 1993

Before BAUER, *Chief Judge,* MANION, *Circuit Judge,* and MOODY, *District Judge.**

BAUER, *Chief Judge.* This case is a direct criminal appeal by four defendants: James Badger, Roscoe Foreman, Marcia Fay Ivy, and Mariano Lettieri. These four defendants and a fifth defendant were named in an eighteen-

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* The Honorable James T. Moody, United States District Judge for the Northern District of Indiana, is sitting by designation.

count superseding indictment that charged nine individuals with a conspiracy to distribute and possess heroin and cocaine, plus related crimes. Three counts of the indictment were dismissed, and the five defendants proceeded to trial. All were convicted of the remaining counts with which they were charged. After trial, the district court granted the fifth defendant judgement of acquittal due to insufficient evidence. The four remaining defendants have been joined in this consolidated appeal. Badger, Foreman, and Ivy appeal their convictions. Lettieri appeals both his conviction and sentence, as well as denial of his emergency motion for a new trial. We affirm.

I.

Nedrick Miller, a thirty-year veteran of the Chicago Police Department, was neither serving nor protecting when he conducted a drug sales and distribution operation while managing a west-side Chicago apartment building from late 1987 through April 1989. In addition to his own operation, Miller earned $500-600 weekly for allowing Michael "Ice Mike" Gomire to sell cocaine around the clock from the building, the Washington Pine Apartments ("the Pines"). (Trial Transcript "Tr." 342-49). Gomire rented as many as ten apartments at one time (Tr. 294), using them to process and sell drugs. (Tr. 345). A number of other people also worked in the building. Annette Daggs was the desk clerk (Tr. 292), Marcia Fay Ivy cleaned apartments and common areas (Tr. 1364-65), and Howard Lucas was the janitor. (Tr. 95).

Lucas got a second job when his pay was cut by the building owner. At that time, Miller put him in touch with Gomire, who put Lucas to work breaking down kilograms of cocaine ("kilos") into one ounce quantities. (Tr. 102). After a few months, someone involved in the drug organization learned that Lucas had traded bags of cocaine in exchange for sex. (Tr. 105). When Miller found out, he told Gomire to have Lucas beaten. (Tr. 361). Lucas left town to recuperate, and upon his return he worked for

Miller, rather than Gomire, picking up drugs. (Tr. 107). Lucas sometimes picked up drugs from Mariano "Mario" Lettieri (Tr. 108), who owned Mario's Butcher Shop and Food Center ("the butcher shop") located near Miller's building. (Tr. 1260). Lucas picked up drugs from Lettieri on at least three occasions. The first time, he met Lettieri at a suburban sandwich shop and picked up a kilo. (Tr. 109-12). On another occasion, he accompanied Miller to meet Lettieri and picked up another kilo at a suburban cemetery (Tr. 112-15), and a third time he picked up several ounces of Karachi heroin from the butcher shop. (Tr. 115-18).

In the summer of 1988, Miller and Lettieri were at Loretto Hospital, where Miller and Gomire held a meeting while Lettieri looked on from another room. Miller invited Gomire to participate in a consignment sale of Lettieri's cocaine. (Tr. 349-53). Gomire agreed, and the three men began a joint operation to sell cocaine from the Pines. Gomire and Miller sold three to four kilos on consignment for Lettieri. (Tr. 353-56). Each kilo brought about $50,000 on the street. Usually $8000 of that was spent on "expenses" such as money lost in police raids and sandwiches for the workers. Miller and Gomire divided the remaining $42,000 into $1000 bundles. Lettieri's share was $29,000, which was delivered to him at the shop. Miller and Gomire kept the balance for themselves. (Tr. 354-55).

The Government learned of these activities, and in late 1987, the United States Drug Enforcement Administration ("DEA") began investigating Miller and the drug operations at the Pines. (Tr. 493). In September 1988, DEA Special Agent Van Quarles went undercover with the help of a confidential informant called Top Cat or TC. (Tr. 160). Agent Quarles portrayed a drug trafficker from Grand Rapids, Michigan called "Little Wolf". (Tr. 159-61). The "Little Wolf" cover worked, and Quarles arranged to buy cocaine from Miller. (Tr. 217-50). Daggs acted as Miller's mouthpiece, and Quarles worked through her at Miller's instructions. (Tr. 171). Despite that, Quarles met with Miller on two occasions. (Tr. 167, 172). At one of those

meetings, Miller generously lent Quarles advice on how to best run a drug trafficking operation. (Tr. 172-73). At both meetings, Miller related details about losing $30,000 of Karachi heroin. (Tr. 168, 175). Quarles successfully purchased cocaine on four occasions, picking up the drugs from Daggs. (Tr. 218, 221, 231, 236). Little Wolf tried to set up a fifth cocaine purchase during January and February 1989, but Daggs told him that the cocaine sources had dried up. (Tr. 243).

Attempts to buy cocaine for resale to Little Wolf brought Marcia Fay Ivy into the picture. (Tr. 368, 1386). To the drug operators at the Pines, Ivy was known as Iyesha.[1] In February 1989, Ivy telephoned Roscoe Foreman, a Chicago attorney, and James Badger, a co-owner of a towing company (Tr. 959-60), and asked them to supply her with cocaine. (Tr. 1386-92). Foreman had met Ivy through his brother-in-law, and knew her as Eleanor McKinney (Tr. 804), or Bay-Bay. (Tr. 809).[2] Foreman and Ivy struck up a social and business relationship. At times, Foreman and his former wife would socialize with Ivy and her cousin. In addition she babysat his children, cleaned his house, and taught his wife to cook. (Tr. 758, 804, 809). Ivy was also a cousin to one of Badger's business partners, who introduced them. Badger also knew her as Eleanor McKinney (Tr. 962), and in 1988, she worked for Badger in a side business he had selling clothing. (Tr. 962-63).

The DEA listened to Ivy's conversations with Foreman and Badger; Miller's telephones had been tapped. (Tr. 499-502). They heard four of Ivy's conversations—two each with Foreman and Badger—arranging drug transactions. In the first conversation between Ivy and Badger, Ivy asked Badger how much it would cost her to get a "key" (kilo) from his suppliers. Badger replied "nineteen" or "nineteen five". (Govt. Exh. Tape No. 22). In drug circles,

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[1] Ivy took the name Iyesha Ali when she began following Islam. (Tr. 1328).

[2] Ivy's birth name was Elnora Yvonne McKinney. (Tr. 1328).

these prices were understood to mean a cost of nineteen or nineteen and a half thousand dollars per kilo. (Tr. 520). In the second conversation with Badger, Ivy called to confirm the price. (Govt. Exh. Tape No. 25).

Ivy's conversations with Foreman were similar. In the first one, Ivy asked Foreman whether he could get a "half a key" and what it would cost. Foreman indicated he would check. (Govt. Exh. Tape 24). In the second conversation, Foreman told Ivy he could get the cocaine, and it would cost "eleven dollars". (Govt. Exh. Tape 26). Eleven dollars, in the course of a drug transaction, is short form for eleven thousand dollars. (Tr. 521).

Ivy, Badger, and Foreman testified at trial. Ivy testified that she was only pretending to arrange drug deals, and alluded to a "caper" she was going to "pull off". (Tr. 1374-1393). That caper allegedly was a plan to steal Little Wolf's money as she had done on a previous occasion to another drug dealer. Both Foreman and Badger testified that they knew Ivy was pretending and they were simply humoring her. Foreman stated that he believed Ivy to be coming into money for some reason (Tr. 821-28), and Badger testified that he believed Ivy was pretending to act as a go-between for a drug deal but instead would "rip-off" the drug dealer by keeping the money and not delivering the drugs. (Tr. 964-65).

Co-conspirators Lucas, Gomire, and Daggs testified for the prosecution. The jury returned guilty verdicts on all counts, and the defendants were subsequently sentenced. The only challenge to the sentences comes from Lettieri, who received 190 months imprisonment followed by five years of supervised release. The case did not end, however, after sentencing.

In an unusual turn of events, Lettieri filed a motion for a new trial because Gomire recanted his trial testimony in a sworn affidavit. Gomire stated that while he was in Cook County jail on an attempted murder charge, he was asked by a Chicago Police officer to give information about

Gomire's activities with Miller and Lettieri. Gomire averred that he felt threatened by the officer when he told him that he [Gomire] had no illegal dealings with Lettieri. Because of this alleged threat, Gomire claimed that he implicated Lettieri in the conspiracy and testified against him at trial in an effort to "protect [Gomire's] own best interests". Shortly after the recantation, Gomire was transferred to federal custody. Once there, he met with government attorneys and the trial judge and told them he had lied in the affidavit.

A special hearing was held to unravel the issues. At the hearing, Gomire recanted his recantation. He related that the attempted murder charge for which he was in jail resulted from a shooting where Gomire and a gang member exchanged gunfire after arguing about Gomire's trial testimony. (Hearing. Tr. 161). While in prison for the attempted murder, Gomire said that he was beaten up by gang members for being in violation of the gang's code. The violation, Gomire was told, was testifying against his co-defendants. (Hearing. Tr. 164-66). Not long after he was beaten up, Gomire was given an article from a prominent local magazine stating that Gomire and two others were planning to murder a prominent gang member. This article caused Gomire to fear retaliatory acts by members of the same gang. (Hrg. Tr. 166-67). Gomire testified that after these incidents, he was approached by an inmate (the same one who delivered the article) and was told that Lettieri was on the telephone and wanted to talk to him. Gomire talked to Lettieri, who asked him to change his story and contradict his trial testimony. (Hrg. Tr. 169-70). Gomire agreed; as a result, his girlfriend received several large cash payments and groceries from Lettieri's associates. (Hrg. Tr. 6, 9, 11-18).

The district court considered the hearing testimony and determined that Gomire's affidavit was false, and denied the motion for a new trial. Lettieri's appeal of this denial was consolidated with the convictions already appealed.

II.

Ivy, Foreman, and Badger:

A. Sufficiency of the evidence of conspiracy:

Foreman and Badger argue that the evidence is insufficient to establish their membership in the conspiracy. To be successful, the defendants must show that when viewing the evidence in the light most favorable to the government, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The essential elements necessary to find a conspiracy are a combination or confederation of two or more people that is formed for the purpose of committing, by their joint efforts, a criminal act. *United States v. Whaley*, 830 F.2d 1469, 1473 (7th Cir. 1987), *cert. denied*, 486 U.S. 1009 (1988).

The defendants cite *United States v. Townsend*, 924 F.2d 1385 (7th Cir. 1991), to support their arguments. In *Townsend*, we held that mere sale or purchase of drugs is not enough to join a conspiracy, but if a drug supplier knows of, and has an interest in, the redistribution of the drugs by the co-conspirator, then he has joined the conspiracy. *Id.* at 1390-91. In *United States v. Auerbach*, 913 F.2d 407 (7th Cir. 1990), this court held that to prove a conspiracy, the government must present enough evidence to show that the defendant knew of the conspiracy and intended to join its criminal purpose. *Id.* at 414-15. In *Auerbach*, we stated that if the defendant knew or had reason to know that other retailers were involved in a broad distribution and retail sale of narcotics, and believed that his or her benefits depended on the success of the venture, then the jury could find that the defendant agreed to participate in the overall scheme. *Id.* at 415 (quoting *United States v. Grier*, 866 F.2d 908, 924 (7th Cir. 1989)). "Evidence of mere association with conspirators, knowledge of a conspiracy, and presence during conspiratorial discussions, without more, will not do the trick." *United*

States v. Paiz, 905 F.2d 1014, 1020 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1319 (1991).

Foreman argues that at the very most, the conversations establish a buy-sell agreement. He argues that the taped conversations do not establish Foreman's knowledge that Ivy was buying for Miller and that Miller was going to resell the drugs. Against this argument, Miller can be heard in the background of the tape answering Foreman's question about what quantity of cocaine was needed, and asking Ivy to ask Foreman what the price was for a half kilo. The jury listened to the tape and from that could determine whether Foreman was going to buy drugs to sell to Ivy, with knowledge that those drugs were being purchased specifically for Miller because they were in the quantity Miller requested. The tapes are direct evidence of a conspiracy, and the jury could reasonably conclude that Foreman had a stake in Ivy's ability to resell the drugs to Miller, and was to benefit from Ivy and Miller's continued resale.

We are not limited to a review of direct evidence when considering if the evidence at trial was sufficient. "[W]e will continue to . . . accept circumstantial evidence as support, even sole support, for a conviction." *United States v. Durrive*, 902 F.2d 1221, 1229 (7th Cir. 1990). With that in mind, we consider that throughout his testimony, Foreman discussed his familiarity with Ivy's drug problems (Tr. 811-15), and that he knew Ivy lived and worked in a drug infested apartment building. He testified that Ivy told him "it's drugs everywhere, it's people lined up from the doorway all the way up the stairs, and the line getting drugs is like a supermarket." (Tr. 819-20). With all this, it would not be unreasonable for the jury to conclude that Ivy was not merely pretending to arrange a drug purchase when she called Foreman, and that Foreman knew or should have known that the large quantity of drugs Ivy sought to buy were for further distribution through the Pines network.

Similarly, Badger argues that the telephone conversations, considered in the light most favorable to the govern-

ment, establish only a buy-sell agreement between him and Ivy. Again, Miller can be heard in the background of the tape discussing with Ivy the quantity and quality of drugs he wanted her to get from Badger. Also, at one point Ivy vouches for the individual who was supplying the money for the transaction—Miller. (Govt. Tape Exh. 22). From these conversations the jury could reasonably conclude that Badger knew that Ivy was buying for the purpose of redistributing the drugs. The evidence presented against both Badger and Foreman is sufficient under *Townsend, Auerbach,* and *Durrive.*

Ivy also challenges the sufficiency of the evidence linking her to the conspiracy. She argues that when considered in the light most favorable to the government, the evidence establishes only that she was either a potential buyer or a broker for drug transactions. Without consummation of the transactions, Ivy claims that the holding in *United States v. Manzella,* 791 F.2d 1263 (7th Cir. 1986), bars her conspiracy conviction. This argument misconstrues *Manzella.* In that case, the defendant brokered a four-cornered drug transaction. An undercover DEA agent negotiated to buy a kilogram of cocaine from a person named Rizzo. Rizzo looked to the defendant, Manzella, to get the kilo. Manzella, in turn, telephoned someone to arrange purchase and delivery of the cocaine. Much to Manzella's displeasure, the cocaine never arrived. The government prosecuted Manzella for possession with intent to distribute, and for conspiracy to commit that crime. We reversed Manzella's conviction for possession (but not for conspiracy) because Manzella never possessed—constructively or otherwise—the cocaine. Ivy attempts to read into *Manzella* a requirement that the transaction must be completed to uphold a conspiracy conviction. *Manzella* simply does not establish such a rule. In fact, we noted that ample evidence existed to prove Manzella's role in the conspiracy, despite the fact that the only cocaine transaction contemplated never came to fruition. *Id.* at 1265. Ivy's conviction fits squarely under *Manzella.*

B. Prosecutorial misconduct:

Ivy and Foreman argue that the prosecutor's comments in his rebuttal argument at the close of the trial regarding "Elmo" were improper and violated their constitutional due process rights. When analyzing allegations of prosecutorial misconduct during argument, we look at the disputed remarks in isolation to determine if they are proper. If the statements are proper, our analysis ends. If the statements are improper our second step is to look at the remarks in light of the entire record to determine if the defendants were deprived of a fair trial. *United States v. Gonzalez*, 933 F.2d 417, 430 (7th Cir. 1991). We consider 1) the nature and seriousness of the prosecutorial misconduct, 2) whether the prosecutor's statements were invited by conduct of defense counsel, 3) whether the trial court instructions to the jury were adequate, 4) whether the defense was able to counter the improper arguments through rebuttal, and 5) the weight of the evidence against the defendant. *United States v. Pirovolos*, 844 F.2d 415, 425 (7th Cir.), *cert. denied*, 488 U.S. 857 (1988) (citing *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)); *United States v. Neely*, No. 88-1387, etc., slip op. at 14 (7th Cir. Nov. 18, 1992). These factors carry varying weight depending on the facts of each case.

Applying these principles, we look at the circumstances surrounding this case. Elmo was a drug dealer with whom both Foreman and Ivy were familiar. (Tr. 823, 1357). DEA Special Agent John Riley testified that he and his partner Agent William Maloney dispatched another DEA agent to locate Elmo after hearing reference to him in the Foreman-Ivy telephone conversation. In the course of this search, the agent visited Foreman's office on north Michigan Avenue in Chicago. This office suite belongs to a company that leases it to a variety of businesses. The company provided an office and conference room to Foreman on a part-time basis, received calls for him, and relayed messages to him at his home. (Tr. 801, 1138-39). The investigating agent was not available to testify at trial, so Agent Riley

testified in his stead. He stated that when the agent inquired whether Elmo was there, the receptionist told the agent that he was not, but would be returning shortly. (Tr. 705). The prosecutor incorrectly recounted this testimony in his rebuttal argument. He stated that the agent telephoned Foreman at his office and that the call was received at the Michigan Avenue location or automatically transferred to Foreman's Hyde Park home, then answered by someone who said that Elmo would be right back. (Tr. 1675-76). Foreman's attorney vociferously objected to the prosecutor's account, asked for a sidebar, and moved for a mistrial. (Tr. 1676-77). The court did not rule on the motion at that time, but it did tell the jury that a dispute had arisen as to what the evidence had shown, and instructed the jury to consider what they had heard and disregard any argument that conflicted with that evidence. Although we find no record of the district court ruling on the mistrial motion, it is apparent that the motion was denied.

The prosecutor misstated the evidence. The misstatement could lead the jury to some unsupported inferences. First, that Elmo, an acknowledged drug dealer, worked for, or was closely associated with, Foreman. Second, that both Foreman and Ivy were lying when they testified that the Elmo reference in the telephone conversation was not specifically about a person, but rather about the secondary meaning the name Elmo had developed—"devil". (Tr. 823, 1440-41). Third, that Ivy was lying when she testified that she knew little about Elmo, and did not know where to find him. (Tr. 1423). No acceptable inferences can be drawn from the misstatement. *See Pirovolos*, 844 F.2d at 424-25; *cf. Neely*, slip op. at 19.[3] For these reasons, the misstatement was improper.

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[3] In *Neely*, the several defendants were convicted of an insurance fraud scheme in which they faked car accidents and reported phantom injuries to collect insurance proceeds. Defendant Ben Isreal's physician testified that the Isreal's injuries were ambiguous. In

(Footnote continued on following page)

Our second inquiry is whether the improper statement rendered the trial fundamentally unfair or substantially influenced the outcome in relation to Foreman and Ivy. The statements are considered in context of the entire trial. First, we do not believe the prosecutor intentionally misstated the testimony about Elmo. Next, the prosecutor ceased this line of argument when the defense objected. Also, immediately following the objection and sidebar, the trial court instructed the jury to disregard any statement of the evidence that did not comport with what was presented at trial. (Tr. 1678). On the other hand, the prosecutor's comments were not invited by the defense, and the defense did not have an opportunity to address the jury following the misstatement of the evidence.

The final factor is the weight of the evidence against both Foreman and Ivy. The cornerstone of Foreman's and Ivy's convictions were the tapes. The tapes revealed that Elmo was only a potential source of the cocaine, and Foreman was going to talk to his "other partner" about getting the drugs, rather than dealing with Elmo. (Govt. Tape Exh. 24). Elmo's identity was not an essential element of proving Foreman's and Ivy's role in the conspiracy. In addition, Agent Riley's testimony regarding Elmo was second-hand, and the defense countered that testimony effectively when questioning witnesses about the procedures followed by Foreman's office leasing company. (Tr. 801-03; 1138-40). With regard to Ivy, Gomire testified to her involvement in the drug transactions. (Tr. 368). We believe that the weight of the evidence is heavy against Foreman and Ivy, and that the misstatement regarding

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[3] *continued*
closing argument, the prosecutor made a comment that could be understood as stating that Isreal's injuries were faked because the other defendants also faked their injuries, and therefore Isreal conspired with the other defendants. The prosecutor's comments, however, could be understood in another way. The statement could also be a challenge to the weight of the defendant's medical evidence. In light of the alternate interpretation, we held that the prosecutor's comments were not improper.

Elmo was not enough to have affected the jury verdict. In sum, although the prosecutor's comments were not invited, and the defense could not re-address the jury following those comments, we find that the misstatement did not violate the defendants' constitutional due process rights or substantially affect the outcome of the trial.

Foreman and Ivy also challenge the prosecutor's assertion made after the misstatement of facts in the rebuttal. They contend that the prosecution improperly invoked government prestige to strengthen its case when the prosecutor asked the jury whether the unavailable agent would risk his job, reputation, pension, and criminal charges to make up false statements about Elmo. The prosecutor answered his own question "Absolutely not. It makes no sense." (Tr. 1676). This statement, when considered in isolation, is an improper vouching for the credibility of a witness. *United States v. Swiatek*, 819 F.2d 721, 731 (7th Cir.) *cert. denied*, 484 U.S. 903 (1987).

Because the prosecutor's statements about the agent were improper in isolation, we must then consider the statements in the context of the trial to determine whether they were invited by the defense. If the defense strikes the first blow, then the prosecutor's response is within the bounds of proper argument. *Auerbach*, 913 F.2d at 419 (citations omitted). The government argues that its comments were invited when defense counsel attacked the unavailable agent's account of what happened during the Elmo investigation. Defense counsel stated during closing argument:

> That's false evidence. It's a false report. It didn't happen. And they did it, or this agent did it, and he mislead Riley because they got a little desperate about what is going on in this case. They know it's thin, too. That's why Riley's own agent tricked him. It doesn't matter as to what his motive really was; the government had time for rebuttal and you didn't see this guy get on the stand and tell you about that, did you? That it was a mistake? Or tell you, "Yeah,

> I went up there and this is what really happened." Oh, no. He isn't going to get up on the stand because he got caught. And that is a very significant event.

(Tr. 1578-79). The comments in Foreman's closing argument invited the prosecution's response during rebuttal, therefore the prosecutor's remarks were within the bounds of proper argument.

C. Sufficiency of the "telephone" evidence:

Finally, Badger and Foreman argue that the evidence was insufficient to prove their conviction under 21 U.S.C. § 843(b).[4] We have already addressed both Badger's and Foreman's challenges to their conspiracy convictions. Now, we simply determine if they knowingly and intentionally used the telephone to facilitate the conspiracy. The question is easily resolved. The government introduced tapes of Ivy's conversations with Badger and Foreman. The parties do not dispute that they participated in the telephone conversations. They acknowledge they discussed drug deals. The only dispute is to whether they were just playing games with Ivy or truly conspiring. The jury concluded that they were conspiring. The evidence supporting the Section 843(b) convictions is clearly sufficient.

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[4] Section 843(b) states:

> It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing to or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities useful in the transmission of . . . sounds of all kinds and includes . . . telephone . . . communication.

Mariano Lettieri:

A. Prosecutorial misconduct:

In his first challenge to his conviction, Lettieri argues that repeated acts of prosecutorial misconduct denied him a fair trial. Initially, he claims the government improperly questioned him about a prior misdemeanor crime to which he pleaded guilty. Defense counsel moved in limine to bar questions about that crime. (R. 257). The basis of the motion was Fed. R. Evidence 608(b) and 609(b). Those rules establish how and when unrelated convictions may be used to attack the witness' credibility.[5] Our review of the record reveals no ruling on the motion in limine. Counsel did not file any further documents asking for a ruling, nor did counsel object when the questions were posed.

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[5] Rule 608(b) states in relevant part:

> **(b) Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . .

Rule 609 states in relevant part:

> **(a) General rule.** For the purpose of attacking the credibility of a witness,
>
> **(b) Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Lettieri challenges the cross examination questions as improper pursuant to Federal Rules of Evidence 404(b) and 609(b).[6] When Lettieri filed his motion in limine, it did not include a Rule 404(b) challenge. Because no ruling was made on the motion in limine and because no contemporaneous objection was made at trial, we review for plain error.[7] *United States v. Brantley*, 786 F.2d 1322, 1327-28 (7th Cir.), *cert. denied* 477 U.S. 908 (1986).

Lettieri puts a unique spin on the issue, claiming that plain error occurred not merely by admitting the testimony, but rather, that plain error occurred because the district court did not give the jury a limiting instruction. He cites *United States v. DeGeratto*, 876 F.2d 576, 584 (7th Cir. 1989), to support this proposition. *DeGeratto* involved a prosecution against a grocer, DeGeratto, who allegedly stole meat shipments. During the course of the trial, DeGeratto's business partner was being investigated by federal prosecutors for an alleged prostitution operation, unrelated to the stolen meat shipments. DeGeratto was called to testify before the grand jury about his partner's activities. The grand jury testimony was available to the prosecutors, who relentlessly questioned DeGeratto at his own trial about his role in the unrelated prostitution operation. No evidence linked DeGeratto to the prostitution operation, but the government argued that a prostitution conspiracy existed, and that DeGeratto was a part of it. We held that the government's line of questioning and argument was completely improper. We determined that the improper questioning prejudiced the trial, and reversed DeGeratto's conviction and ordered a new trial. Our decision made clear that the trial court's failure to

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[6] Rule 404(b) bars admission of evidence of other crimes to prove the bad character of a person in order to show the person acted in conformity with that bad character.

[7] Omission of the Rule 404(b) argument in the motion in limine requires us to consider it under a plain error standard anyway. *See United States v. Brown*, 948 F.2d 1076, 1081 n. 9 (8th Cir. 1991).

instruct the jury to disregard the prostitution argument was merely part of the mix that added to the prejudice.

Although Lettieri's prior crime was a misdemeanor offense more than ten years old and concerned stolen goods (not drugs), the government justifies their questions about the crime because they reflect on Lettieri's honesty and integrity. Rule 608(b) allows cross examination of the witness about prior instances of misconduct that reflect on the truthfulness of that witness. Lettieri was asked the "prior crime" questions after he was asked whether he was "against thievery". When Lettieri answered that he was against thievery, the prosecution sought to impeach Lettieri's credibility.[8] The questions were not improper

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[8] The colloquy between the prosecutor and Lettieri was as follows:

Q: Mr. Lettieri, you indicated that you are anti-drugs, is that correct, sir?

A: Yes, I am, sir.

Q: Are you also against thievery?

A: Thievery?

Q: Yes, sir.

A: What do you mean by that?

Q: Well, are you against people who steal things?

A: Yes. Probably. Yes, I am.

* * * *

Q: But you consider yourself an honest man, is that correct?

A: Yes, I do.

Q: Isn't it true, sir, that you were not only arrested, but convicted of delivering a stolen computer in 1979?

* * * *

A: That was reduced to a misdemeanor, and I got one year supervision.

Q: Sir, answer the question, if you can.

A: Okay. Yes. Yes.

Q: You were not only charged with that—it as a felony charge—but you plead [*sic*] guilty to doing what the State's Attorney's Office charged you with, isn't that correct, sir?

(Footnote continued on following page)

under these circumstances, but even if they were, the exchange between the prosecutor and Lettieri did not render the trial fundamentally unfair, unlike the exchange in *DeGeratto*. Also, in this case the judge had no reason to offer a limiting instruction because the defendants did not object contemporaneously to the questioning.

The testimony about the prior theft offense neatly lead the prosecution to a line of questioning fleshing out whether Lettieri had dealt in stolen goods with Miller. When asked, Lettieri answered "no", but the prosecutor persisted in trying to link Lettieri to this activity. (Tr. 1262-65).[9] This

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[8] *continued*

A: Yes.

Q: That was delivering a stolen microcomputer?

A: I didn't deliver anything.

Q: Well, that's what you're charged with.

A: Right, but I didn't deliver anything.

Q: And you plead [*sic*] guilty to that offense?

A: Right. If you would let me explain what happened, the reason why?

Q: Well, your answer is yes, you plead [*sic*] to that offense?

A: I guess I have to say "Yes".

Q: Now, sir, that was not the first time, or the last time that you were involved in delivering or selling stolen goods, isn't that right, sir?

A: When was the second time?

Q: Well, what is your answer, yes or no?

A: I would have to say "No".

Q: So, that was the last time, in the late '70s, when you were involved in delivering a stolen piece of merchandise, is that correct?

A: I guess so. 1970, yes.

(Tr. 1257-58).

[9] The colloquy between Lettieri and the prosecutor was as follows:

Q: Isn't it true that you were dealing in stolen goods, in addition to drugs, with Mr. Miller?

(Footnote continued on following page)

testimony is not justified under either Rules 404(b) or 608(b). Nor did these questions serve to impeach Lettieri's prior testimony. No evidence in the record supports an inference that Lettieri and Miller dealt in stolen goods. No proper justification existed for admission to this line of questioning. The defense, however, did not object. Again we review for plain error. Although the prosecutor did not abort this line of questioning when Lettieri said "no," the colloquy did not reach the same level of intensity as did the questioning in *DeGeratto*. Also, Lettieri had an opportunity to counter the testimony through redirect examination, other witnesses, and closing arguments. In addition, the strong weight of the evidence was against Lettieri. Lucas and Gomire both gave damning testimony against Lettieri. Moreover, Daggs' testimony about Miller delivering large sums of cash to Lettieri substantiated Lucas' and Gomire's testimony. We do not find plain error in the prosecutor's line of questioning.

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[9] *continued*

A: No, sir.

Q: Well, sir, isn't it true that in the middle of March of 1989, Mr. Miller advised you that about $56,000 worth of jewelry and that type of thing—money—had been stolen out of his apartment?

A: Mr. Miller called me the day that he got robbed—which you have transcript and a tape, if you want to play it—called me at work saying, "Did you send somebody here, motherfucker, to rob me?" He was, I guess, joking. I said, "What's going on? What are you talking about?" He says, "Well, somebody came in and stole everything that I got." He said, "Well, if anybody comes to your store trying to sell you a ring, a gold bracelet watch" this and that "let me know or hold him." Being on the west side of Chicago, you know that people are always trying to sell something, all day long.

Q: And you buy it, isn't that right?

A: No, I don't.

Q: Isn't it true that you buy stolen cameras, stolen VCRs?

A: No, I don't.

(Tr. 1262-65). The colloquy continued, apparently trying to establish that Lettieri is a fence, providing an outlet for stolen merchandise.

The government also pursued another line of questioning that Lettieri challenges on appeal. The prosecutor asked Lettieri if he knew a person named John Latham. When Lettieri answered that he did not know Latham, the prosecutor then asked Lettieri if he had sold drugs for Latham. Again, Lettieri answered "no". (Tr. 1265). No objection was lodged, so as before, we review for plain error. These were the only two questions posed to Lettieri about his link to John Latham. Latham was not otherwise identified, and the questions were completely secondary to the issues that the jury were to consider. We do not believe that during the course of a two week trial, these two questions about a secondary issue reach the level of plain error.

Lettieri raises various other claims of prosecutorial misconduct. He states that the government improperly questioned Lucas about his plea agreement, and later when the prosecutor referred to that testimony during the closing argument, Lettieri claims the prosecutor improperly vouched for Lucas. Defense counsel did not object to the testimony, and our review is for plain error. *Swiatek*, 819 F.2d at 731. During the trial, Lucas testified only that he was required to tell the truth or face a perjury prosecution, and that the maximum penalty he faced for the charges to which he pleaded guilty was forty years. This was not improper under our holding in *United States v. Creamer*, 555 F.2d 612, 617 (7th Cir.), *cert. denied*, 434 U.S. 833 (1977), where we stated that a witness may testify to his or her plea agreement and the penalties faced if that plea agreement is breached. The prosecutor's later reference to the plea agreement during closing argument was merely a reiteration of the testimony that we have already held to be proper. The prosecutor neither insinuated that he possessed knowledge outside the record, nor injected his personal beliefs about Lucas' veracity. The prosecutor's comments were not improper. *Id.*

Lettieri also claims the prosecutor improperly asked him about the boiler room in the butcher shop where Lucas allegedly picked up Karachi heroin. The description and

layout of the boiler room could cast doubt on Lucas' account of a drug transaction. During the government's cross examination of Lettieri, the prosecutor asked if Lettieri would mind leaving the witness stand to get a photograph of the room (apparently from the defense table). Lettieri, however, did not have a photograph. The defense objected, and the colloquy was stricken from the jury's consideration.

The government may not suggest that information not in evidence supports its case. *United States v. Stillwell*, 900 F.2d 1104, 1112 (7th Cir.) *cert. denied*, 111 S. Ct. 111 (1990). The government has the burden of proving the defendant's guilt by introducing evidence to support its theory of the case. The defendant does not have to disprove his guilt by introducing evidence contrary to the government's theory at the government's behest. The government's cross examination tactic was improper. The exchange, however, did not result in reversible error. The defense objected contemporaneously, and the judge immediately instructed the jury to disregard the exchange. Lettieri had an opportunity to counter the improper statements with redirect examination and closing argument. The conduct was not so improper that the fairness of the trial was fundamentally flawed. Nor did the comment shift the burden of proof. *Cf. United States v. Dahdah*, 864 F.2d 55, 59 (7th Cir. 1988), *cert denied*, 489 U.S. 1087 (1989).

Apparently unwilling to say uncle, during closing argument the prosecutor again brought up the "boiler" testimony. He explained that the government did not have a search warrant for the butcher shop, but questioned why Lettieri did not produce a photograph of the boiler room to challenge Lucas' testimony about the drug deal. (Tr. 1687). The defense did not object, and we review for plain error. In light of the impropriety of this line of questioning during cross examination, we find this argument no more proper during the rebuttal. We interpret this revisit to the "boiler" testimony as an inartful attempt by the prosecutor to emphasize how the burden of proof had been fulfilled, allowing the jury to find Lettieri guilty

beyond a reasonable doubt. Unfortunately the prosecutor chose to do this by inferring that items not in evidence supported his case. This violated the rule set forth in *Stillwell*, 900 F.2d at 1112. We consider again the *Pirovolos* elements, and determine that the error was not egregious and the weight of the evidence was against Lettieri. Balancing each of these factors, we hold that under a plain error analysis the comment was not so prejudicial as to render the trial fundamentally unfair.

Lettieri's additional claims of government misconduct also concern the closing argument. During the argument, the prosecutor stated, "We know that Mr. Lettieri is probably the most desperate of all the defendants in this case. Why do I say that? I say that because of the defense he put on, the contrived defense." (Tr. 1685). The prosecutor should not inject personal opinion into the argument and should not speak as if he "knows" what the jury believes. *Auerbach*, 913 F.2d at 418 (citing *United States v. Young*, 470 U.S. 1, 17 (1985)). But the defense did not object, and *Young* tells us that during closing arguments, plain error occurs only if the misconduct unfairly prejudiced the jury's deliberations. *Young*, 470 U.S. at 16-17 n.14. The prosecutor's comments were not so inflammatory as to render the trial fundamentally unfair, constituting plain error.[10]

The final claim of prosecutorial misconduct challenges the prosecutor's statement to the jury asking them to "send a message" by convicting Lettieri. The defense objected immediately, and the district court sustained the objection, striking the argument from the record. (Tr. 1690). Lettieri argues that this statement invites the jury to act outside the law—inviting conviction for the purpose of sending a message rather than because the government

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[10] Lettieri argues in his brief that the prosecutor said that the defense was the most contrived that the prosecutor had "ever seen". (Lettieri Brief at 38.) The transcript reveals no such statement by the prosecutor.

has proven Lettieri guilty beyond a reasonable doubt. Defense counsel quickly objected. The district court sustained the objection and counseled the jury to disregard the statements. Also, the jury was properly instructed as to the burden of proof before being sent to deliberate. We presume juries follow such instructions. *United States v. Bell*, No. 91-3271, slip op. at 5 (7th Cir. Nov. 25, 1992). We do not find that the prosecutor's comments were so serious that they prejudiced Lettieri.

Lettieri claims that all these incidences of "misconduct" cumulatively affected the jury's verdict, denying his constitutional right to due process. We consider whether the outcome of the trial would be different in the absence of the prosecutor's misconduct. *Solles v. Israel*, 868 F.2d 242, 248 (7th Cir.), *cert. denied*, 490 U.S. 1101 (1989). The prosecution trod a fine line in its behavior at trial. We do not condone this behavior, but we do not believe that the prosecutor's actions were so egregious that the jury would have returned a different verdict absent such conduct.

B. The recantation:

Next, Lettieri argues that the district court abused its discretion when it denied his motion for a new trial based on Gomire's recantation. Recantations are viewed skeptically. *United States v. Kamel*, 965 F.2d 484, 494 n. 25 (7th Cir. 1992); *United States v. Leibowitz*, 919 F.2d 482, 483 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1428 (1991). An affidavit recanting trial testimony is newly discovered evidence, and, if the circumstances are appropriate, may warrant a new trial. *Leibowitz*, 919 F.2d at 483. The standard under which newly discovered evidence requires a new trial is somewhat in dispute. We set forth a three-part test in *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928). Under *Larrison*, a new trial is necessary when 1) the court is satisfied that the testimony given by a material witness is false; 2) without the false testimony the jury might have reached a different conclusion; and 3) the party seeking the new trial was taken by sur-

prise when the false testimony was given and could not address that falsity until after trial. The dispute arises in part three—how much surprise is required. *See Leibowitz*, 919 F.2d at 484-85; *cf. United States v. Mazzanti*, 925 F.2d 1026, 1029 (7th Cir. 1991). We resolve this case on the first element, so we may leave the "surprise" dispute for another day.

In *Leibowitz*, the chief prosecution witness recanted his testimony after the trial in affidavits submitted to the district court. Following trial, the witness was jailed in the same facility as the defendant, Leibowitz. Leibowitz, a former attorney, prepared the affidavit that the witness signed. As in *Leibowitz*, Lettieri established a threatening presence at the jail where the recanting witness was incarcerated. Gomire was then contacted by Lettieri about changing his testimony. Gomire received economic favors from Lettieri, and Lettieri's attorneys drafted the affidavit which Gomire signed, without the aid of counsel. In both this case and *Leibowitz*, each witness was pressured by the defendant against whom he testified, and each signed affidavits drafted by those defendants or their representatives.

In both cases the judges held evidentiary hearings to consider the reliability of the recantation. In *Leibowitz*, the judge found the recantation suspect, despite the recanting witness' adherence to the recanted position. Here, an even greater reason exists to find the recantation suspect. Gomire disavowed the recantation. The judge had an opportunity to listen to Gomire's explanation and consider other testimony and evidence when finding that Gomire had testified truthfully at the trial. His determination of Gomire's credibility is a factual finding that we review under a clearly erroneous standard. *Smith v. BMI*, 957 F.2d 462, 463 (7th Cir. 1992). The finding that Gomire lied in his affidavits is not clearly erroneous. The district court did not abuse its discretion in determining that no basis existed to grant Lettieri a new trial.

Lettieri argues that Gomire's testimony is inherently unreliable in light of his statements at trial, the recant-

ing affidavits, and the subsequent recantation of the affidavits at the evidentiary hearing. Citing *Mesarosh v. United States*, 352 U.S. 1 (1956), the defense claims that Gomire must be completely discredited due to his conflicting stories, and therefore Lettieri must be retried. We do not agree.

Mesarosh involved a government informant who testified against various individuals, asserting that they were members of the Communist Party. The informant testified in several different proceedings and acknowledged that he lied under oath on at least one occasion at the instruction of government officials. The officials denied the allegations. The informant also testified to bizarre allegations of assassination plots against senators, congressmen, and other government officials. The Solicitor General stated during motions proceedings before the Court that the informant's testimony was unreliable. The question then presented to the Court was whether the waters of justice had been so poisoned that the integrity of the United States Government called for a new trial to "cleanse the reservoir" of all impurities. The Court ordered a new trial to preserve the untainted administration of justice.

Mesarosh is clearly distinguishable. In that case, the witness lied under oath on several occasions, testifying to bizarre scenarios with no apparent basis in fact. In addition, the government attorney, who presumably knew the witness and the information to which he was testifying, urged the Court to discredit the testimony. Here, the district court found that Gomire did not lie under oath, but rather, he lied in his affidavit. In addition, the circumstances surrounding the affidavit lend support to Gomire's account of the reasons why he recanted his trial testimony. Although Gomire is by no means the perfect witness, his testimony was not so incredible that *Mesarosh* requires him to be discredited.

Lettieri's additional claim that Gomire's testimony at trial and at the hearing were inconsistent is not enough to warrant a new trial under *Mesarosh*. The statements

are not clearly inconsistent, and to invoke the public policy protection against the tainted administration of justice, Lettieri needs to show more than perceived inaccuracy in the testimony.

C. Abuse of the Grand Jury process:

Lettieri also claims that the trial court improperly allowed the government to introduce evidence that was obtained through an abuse of the grand jury process. The government may not use the grand jury for the sole or primary purpose of obtaining evidence against a defendant who has been indicted. *United States v. Thompson*, 944 F.2d 1331 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1177 (1992). Lettieri argues that one of the witnesses who testified against him at trial was interviewed as a result of an ongoing grand jury investigation after the grand jury had already indicted him for the crime for which the government was seeking information. The evidence in question was testimony by a witness who worked for a securities investment firm where Lettieri had an account. The witness testified that in the fall of 1988—the relevant time frame encompassed by the conspiracy—Lettieri attempted to deposit $50,000 cash into his investment account. (Tr. 480). She testified that when Lettieri came to the office to make the deposit, he was carrying an attaché case filled with bundles of cash. The money was not new currency wrapped in money bands, but rather, it was old and bundled in rubber bands. (Tr. 483).

Lettieri claims that throughout the case he sought access to the grand jury minutes so he could ascertain whether the grand jury was used to acquire this witness' testimony. The district court denied the motion, (R. 351), but did review the grand jury materials *in camera*.[11] (R. 349).

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[11] Lettieri argues that "the Court [*sic*] should not have allowed [the witness'] testimony without at least inspecting the grand jury transcripts and minutes to determine whether there had been an abuse of process." (Lettieri Brief at 44). Our review of the record indicates the district court did just that.

The government counters by stating that a superseding indictment was filed against Lettieri. The government argues that the grand jury investigation continued in an effort to gather additional evidence linking Lettieri to the charges brought in the superseding indictment, and that the witness was interviewed during that ongoing investigation.

Lettieri bears the burden of establishing that the grand jury process was abused. *Thompson*, 944 F.2d at 1337. He does not, however, offer any evidence to dispel the government's argument that the information garnered from the witness was used to bring the charges in the superseding indictment. We have no reason to believe that the sole and dominant purpose of the continuing investigation was to assemble information regarding charges brought in the first indictment rather than marshalling evidence for the charges brought in the superseding indictment.

D. Ineffective assistance of counsel:

Lettieri's final challenge to his conviction is that he was denied effective assistance of counsel in violation of the Sixth Amendment. This court prefers not to consider ineffective assistance of trial counsel claims raised for the first time on appeal. If, however, the record is sufficiently developed, we will consider the defendant's claim. *United States v. Booker*, Nos. 91-3650, 91-3660, slip op. at 5 (7th Cir. Dec. 8, 1992). Lettieri claims his counsel was ineffective because neither of his attorneys objected to the various "inflammatory" and "hearsay" statements that were elicited at trial. This is the type of ineffective assistance of counsel claim that can be considered based on the trial record, and we therefore examine Lettieri's claim.

Ineffective assistance of counsel claims are reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Booker*, slip op. at 5. The defendant must show that the attorney's performance was deficient to the degree that the attorney was not functioning as

"counsel" contemplated by the Sixth Amendment. The deficiency is judged by whether the attorney acted with reasonable professional judgment falling within the wide range of professionally competent assistance. The attorney is strongly presumed to have rendered effective assistance. *Strickland*, 466 U.S. at 690. Second, the defendant must show that actual prejudice occurred as a result of the attorney's deficient performance. Actual prejudice occurs when a reasonable probability exists that but for the attorney's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694.

Lettieri was represented by two attorneys. He argues that his attorneys adopted a policy of not objecting to any evidence, even if it was inflammatory or irrelevant. This policy, he claims, rendered his attorneys' performance unprofessional and outside the wide range of professionally competent assistance. Specifically, Lettieri cites his attorneys' failure to object when Lettieri was being cross examined by the prosecutor about whether he had previously pleaded guilty to a misdemeanor crime. Also, Lettieri points out his attorneys' failure to object to several other statements that allegedly were inadmissible hearsay. He claims prejudice from this inaction and argues that without these errors, the jury would have a reasonable doubt as to Lettieri's guilt.

We find Lettieri's argument unavailing. We note that as a general proposition, Lettieri deemed his attorneys "very competent." (Lettieri Brief at 44). Next, our review of the record shows many motions in limine filed on Lettieri's behalf, as well as many objections made throughout the trial. *See, e.g.*, Tr. at 124, 477, 481, 495. What is more, Lettieri acknowledges that his attorneys objected during the trial. Lettieri's "policy of no objection" argument fails.

E. The sentence:

Lettieri alleges his sentence is based upon an improper and unreliable proffer by an indicted co-conspirator. When sentencing Lettieri under the United States Sentencing

Guidelines, the district court calculated Lettieri's total offense level at 38. The level was based on Lettieri supplying 36 kilos to the conspiracy, and that amount was based in part on Miller's proffer to the government when he pleaded guilty. Lettieri asserts that the proffer completely conflicts with the evidence at trial, and therefore is inherently unreliable. In addition, he claims a Sixth Amendment violation of his right to cross examine the witness, because Miller neither testified at trial or at the sentencing hearing. The amount of drugs upon which a sentence is based is a factual determination based upon a preponderance of the evidence, and we review this decision under a clearly erroneous standard. *United States v. Cea*, 963 F.2d 1027 (7th Cir.), *cert. denied*, 113 S. Ct. 281 (1992).

Hearsay is an integral part of the sentencing process, and the Miller proffer may be considered for sentencing purposes. *United States v. Escobar-Mejia*, 915 F.2d 1152, 1154 (7th Cir. 1990). Although Lettieri claims that the Miller proffer conflicts with the trial testimony, our review of the transcripts reveals no conflicts. We do not have a definite and firm conviction that factual error has been committed, therefore the district court quantity finding is not clearly erroneous. *United States v. Herrera*, 878 F.2d 997, 1000 (7th Cir. 1989).

Lettieri's constitutional claim fairs no better. A convicted defendant does not possess a constitutional right to cross examine a person who provided the government with information that was later used during sentencing. *Williams v. New York*, 337 U.S. 241, 247 (1949); *Escobar-Mejia*, 915 F.2d at 1154. Because Lettieri has no right to cross examine Miller, and because we hold that the district court decision is not clearly erroneous, Lettieri's challenge to his sentence fails.

III.

The defendants' convictions are AFFIRMED in all respects, Lettieri's sentence is AFFIRMED, and the decision denying Lettieri's motion for a new trial is AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 21, 1993

BEFORE:

Honorable William J. Bauer, Chief Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable James T. Moody, District Judge*

Nos. 90-3223, 90-3245, 90-3252, 90-3659 and 91-2460

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

JAMES BADGER, ROSCOE FOREMAN, MARCIA F. IVY and MARIANO "MARIO" LETTIERI,
Defendants-Appellants

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 89 CR 364, District Court Judge Paul E. Plunkett

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered this date.

---

* The Honorable James T. Moody, United States District Judge for the Northern District of Indiana, is sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 26, 1993.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. JAMES T. MOODY, District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee,

No. 90-3659, 91-2460 v.

MARIANO LETTIERI, Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 CR 364—Paul E. Plunkett, *Judge*.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-captioned case by the defendant-appellant, none of the judges in active service has requested a vote thereon and all of the judges on the original panel have voted to deny. Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

---

* The Honorable James T. Moody, United States District Judge for the Northern District of Indiana, is sitting by designation.

APPENDIX C

[Dated November 20, 1990]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 89 CR 364-8

UNITED STATES OF AMERICA

v.

MARIANO LETTIERI

THE DEFENDANT:

☐ pleaded guilty to count(s)_____.
☒ was found guilty on count(s) S1 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: 18 USC 2 and 21 USC 846.

Nature of Offense: Aiding and Abetting a Drug Conspiracy.

Count Number: S1.

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

☒ Count(s) 1st Superseding counts and S7, and S14 through S18 (is) (are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) S1, which shall be due ☐ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

November 16, 1990
Date of Imposition of Sentence

/s/ PAUL E. PLUNKETT
Signature of Judicial Officer

Paul E. Plunkett,
U.S. District Court Judge
Name & Title of Judicial Officer

November 20, 1990
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 190 months.

* * * * *

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
☒ before 2 p.m. on January 2, 1991.

RETURN

* * * * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation officer in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

* * * * *

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

GUIDELINE RANGE DETERMINED BY THE COURT:

Total Offense Level: 38

Criminal History Category: II

Imprisonment Range: 262 to 327 months

Supervised Release Range: ____ to 5 years

Fine Range: $25,000 to $4,000,000

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $_____

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☑ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Guideline adequately dealt with offense.

* * * * *

Supreme Court, U.S.
FILED
AUG 2 1993
OFFICE OF THE CLERK

No. 92-1910

In the Supreme Court of the United States

OCTOBER TERM, 1993

MARIANO LETTIERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
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QUESTIONS PRESENTED

1. Whether petitioner was deprived of a fair trial by prosecutorial misconduct.

2. Whether hearsay evidence was properly introduced at petitioner's sentencing hearing.

3. Whether petitioner's lawyers provided effective assistance of counsel.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 983 F.2d 1443.

JURISDICTION

The judgment of the court of appeals (Pet. App. A30) was entered on January 21, 1993. A petition for rehearing was denied on February 26, 1993. Pet. App. B1. The petition for a writ of certiorari was filed on May 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to distribute heroin and cocaine and to possess those substances with the intent to distribute them, in violation of 21 U.S.C. 846. He was sentenced to 190 months in prison, to be followed by five years of supervised release. Pet. App. C1-C4. The court of appeals affirmed. Pet. App. A1-A29.

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner was part of a drug distribution network in Chicago. From late 1987 through April 1989, co-defendant Nedrick Miller, a Chicago police officer, ran a drug distribution operation from an apartment building that he managed. Miller received a weekly payment for allowing co-defendant Michael Gomire to sell and process cocaine in the building. Petitioner sometimes supplied them with cocaine and heroin. During the summer of 1988, the three men agreed to participate in consignment sales of kilogram quantities of cocaine furnished by petitioner. Gomire and Miller sold three to four kilograms for petitioner. Each kilogram sold netted approximately $42,000, of which petitioner's share was $29,000. Pet. App. A2-A3.

2. At sentencing, a Drug Enforcement Agency agent testified that Miller admitted that he had obtained 36 kilograms of cocaine from petitioner during the course of the conspiracy. The district court credited this testimony, finding it consistent with the evidence at trial. The court increased petitioner's offense level under the Sentencing Guidelines to 38 to reflect his involvement in the

distribution of 36 kilograms of cocaine. Pet. App. A29; Gov't C.A. Br. 3.

After sentencing, petitioner moved for a new trial because Gomire recanted his testimony in a sworn affidavit given while he was in the Cook County Jail. At a subsequent hearing after Gomire had been transferred to federal custody, Gomire retracted his recantation and reaffirmed that his trial testimony was truthful. Gomire explained that he had recanted his testimony because he had been beaten and threatened by other inmates in the Cook County Jail. He also testified that he had received money orders as inducements to recant his testimony. The district court denied petitioner's motion for a new trial, finding that Gomire's affidavit was false and that his trial testimony was truthful. Pet. App. A5-A6; Gov't C.A. Br. 16-17.

3. a. On appeal, petitioner argued that he had been denied a fair trial as a result of prosecutorial misconduct. Petitioner alleged that the prosecutor improperly cross-examined him about a misdemeanor conviction for theft that was more than ten years old. The court of appeals noted that although petitioner filed a pretrial motion to exclude questioning about that conviction, the trial court never ruled on that motion, and petitioner did not make a contemporaneous objection at trial. Pet. App. A15-A17. The court found that the prosecutor's questions about the prior conviction for a crime of dishonesty were proper to impeach petitioner's credibility and that the questioning did not deny petitioner a fair trial. *Id.* at A17-A18.

Petitioner also contended that the prosecutor vouched for the testimony of Howard Lucas, a participant in the drug distribution ring. The court of appeals determined that the prosecutor had

properly questioned Lucas about his plea agreement and merely referred to that testimony in closing argument. Pet. App. A20. The court also found that the prosecutor had "neither insinuated that he possessed knowledge outside the record, nor injected his personal beliefs about Lucas' veracity." *Ibid.*

Petitioner further claimed that the prosecutor acted improperly by asking him about a photograph of the boiler room in petitioner's butcher shop where Lucas claimed to have picked up heroin. During cross-examination, the prosecutor asked petitioner if he would mind leaving the witness stand and getting a photograph of the room. Upon defense counsel's objection, the trial judge immediately instructed the jury to disregard the exchange. The court of appeals held that the prosecutor's conduct, while improper, did not warrant reversal because the trial court gave a curative instruction and petitioner had an opportunity to counter the effect of that question during redirect examination and in closing argument. The court of appeals therefore found that the conduct "was not so improper that the fairness of the trial was fundamentally flawed." Pet. App. A21.[1] The court of appeals also determined that the alleged instances of prosecutorial misconduct, considered cumulatively, did not entitle petitioner to relief. *Id.* at A23.

b. Petitioner argued that his sentence was based on co-defendant Miller's out-of-court statement that

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[1] The prosecutor brought up the boiler room again in his summation, asking why petitioner did not produce a photograph of the room to challenge Lucas's testimony. Because petitioner had not objected to that remark, the court of appeals evaluated the claim of error under the plain-error standard. Applying that standard, the court held that petitioner had not been denied a fair trial. Pet. App. A21-A22.

petitioner supplied him with 36 kilograms of cocaine. Petitioner argued that his right to confront Miller was denied by Miller's failure to appear at sentencing. The court of appeals held that reliable hearsay may be considered at sentencing and that Miller's proffer was consistent with the trial testimony in this case. Pet. App. A28-A29.[2]

ARGUMENT

1. Petitioner contends (Pet. 12-22) that he was denied a fair trial because of prosecutorial misconduct. Specifically, petitioner argues (Pet. 18) that the court of appeals did not determine that he received a fair trial and applied an erroneous standard in rejecting his claims of prosecutorial misconduct. Neither contention is correct.

When a prosecutor has engaged in misconduct, a reviewing court must evaluate any harm caused by the prosecutor's improper remark in light of the entire trial record, any curative steps taken by the trial court, and the weight of the evidence against the defendant. See, *e.g.*, *United States* v. *Dougherty*, 810 F.2d 763, 767-768 (8th Cir. 1987); *United States* v. *Rodriguez*, 765 F.2d 1546, 1560 (11th Cir. 1985). Consistent with that framework, the court of appeals in this case carefully considered each of petitioner's claims of prosecutorial misconduct and determined that petitioner had not been denied a fair trial. For example, the court of appeals properly held that

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[2] The court of appeals also rejected petitioner's claim that his trial lawyers deprived him of effective assistance of counsel by engaging in a "no objection" policy at trial. The court found instead that defense counsel had filed numerous motions in limine and had made many objections at trial. Pet. App. A28.

curative instructions were sufficient to cure the effect of the prosecutor's request that petitioner produce a photograph of his boiler room (where a cohort claimed to have picked up heroin) and the prosecutor's closing remark that the jury should send a message by convicting petitioner. Pet. App. A21-A23.[3]

In several instances, moreover, petitioner's counsel did not contemporaneously object to alleged prosecutorial misconduct, and the court of appeals evaluated those claims for plain error. Fed. R. Crim. P. 52(b). The plain-error standard requires reversal only when a claim forfeited at trial "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Olano*, 113 S. Ct. 1770, 1779 (1993). Under that standard, the court of appeals was correct in finding that the prosecutor's questions concerning petitioner's prior misconduct did not amount to plain error because (A) petitioner had a chance to counter the testimony through redirect examination, calling other witnesses, and argument and (B) the strong weight of the evidence supported petitioner's conviction. Pet. App. A19. The court was also justified in its conclusion that no plain error occurred when the prosecutor referred to petitioner's defense as "contrived." *Id.* at A22.[4] Finally, the court

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[3] In context, moreover, the prosecutor's statement to the jury to "send a message" was not an invitation to disregard the law. Just prior to making that remark, the prosecutor had told the jury that everyone must be answerable to the law. Thus, the challenged statement was properly understood as telling the jury to send a message by holding petitioner to the standards of the law. See Gov't C.A. Br. 24-25.

[4] The court of appeals also properly rejected petitioner's claim relating to the prosecutor's reference to the boiler room during his closing argument. Pet. App. A21. Because peti-

also correctly found (*id.* at A20) that there was no prosecutorial misconduct, much less plain error, when the prosecutor elicited the terms of a government witness's plea agreement and referred back to that testimony in closing argument. See, *e.g.*, *United States* v. *Walker*, 871 F.2d 1298, 1303 (6th Cir. 1989); *United States* v. *Creamer*, 555 F.2d 612, 617 (7th Cir.), cert. denied, 434 U.S. 833 (1977).[5] Petitioner's fact-intensive claims to the contrary do not warrant further review.

Finally, petitioner claims that the court of appeals erred in evaluating the alleged prosecutorial misconduct by asking "whether the outcome of the trial would be different in the absence of the prosecutor's misconduct." Pet. App. A23 (citing *Solles* v. *Israel*, 868 F.2d 242, 248 (7th Cir.), cert. denied, 490 U.S. 1101 (1989)). Contrary to petitioner's argument, the court of appeals properly evaluated individual instances of alleged misconduct in terms of whether petitioner received a fair trial. See Pet. App. A18-A23. The court emphasized, moreover, that the evidence

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tioner did not contemporaneously object to that reference, the court evaluated the claim for plain error. Finding that the error was not egregious and that the evidence against petitioner was strong, the court determined that the prosecutor's remark had not denied petitioner a fair trial. *Id.* at A22.

[5] Petitioner errs in relying (Pet. 20-21) on *United States* v. *Smith*, 962 F.2d 923 (9th Cir. 1992). There, the court of appeals held that plain error resulted when the prosecutor vouched for a government witness and repeatedly staked the government's and court's prestige on the veracity of the testimony presented. *Id.* at 933-936. In contrast, the court in this case found that the prosecutor had not vouched for Lucas's veracity, but merely referred to Lucas's properly admitted testimony that he was required to tell the truth or face perjury charges. Pet. App. A20.

against petitioner was "strong." See *id.* at A19. After concluding that none of the specific instances of misconduct deprived petitioner of a fair trial, the court then determined that their cumulative effect was not sufficiently great that "the jury would have returned a different verdict absent such conduct." *Id.* at A23. The court of appeals' analysis is therefore not contrary to this Court's holding in *Berger* v. *United States*, 295 U.S. 78, 88-89 (1935), that prosecutorial misconduct requires reversal where the evidence against the defendant "[is] not strong" and the cumulative effect of the prosecutor's misconduct "cannot be disregarded as inconsequential."

2. Petitioner contends (Pet. 23-24) that the district court sentenced him on the basis of unreliable hearsay statements from co-defendant Miller about the quantity of cocaine petitioner contributed to the scheme. The courts of appeals have held that hearsay is admissible at sentencing if it is reliable. See, *e.g.*, *United States* v. *Aymelek*, 926 F.2d 64, 68 (1st Cir. 1991); *United States* v. *Byrd*, 898 F.2d 450, 452-453 (5th Cir. 1990). Petitioner does not contest (Pet. 23) that principle, but contends that the district court in this case failed to determine the accuracy of the hearsay introduced. The district court, however, found that Miller's information "dovetail[ed] with a lot of the testimony at trial." Gov't C.A. Br. 43. The court of appeals, moreover, found that Miller's testimony that petitioner supplied 36 kilograms of cocaine to the scheme was not contradicted by the trial record. Pet. App. A29.

3. Petitioner claims (Pet. 25-27) that his attorneys rendered ineffective assistance of counsel by failing to object to certain evidence and arguments at trial. To demonstrate ineffective assistance of counsel, a

defendant must satisfy two requirements. First, he must demonstrate that his attorney's performance was constitutionally deficient—that is, that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). Second, a defendant must establish prejudice by showing that his counsel's errors were so serious that they denied him a fair trial. *Ibid.*

Petitioner alleges ineffective assistance of counsel because his lawyers failed to object to (1) Annette Daggs' hearsay testimony that Miller told her that certain cash in his possession was for petitioner; (2) Gomire's hearsay testimony that Miller told him that petitioner had supplied Miller with cocaine; (3) the prosecutor's cross-examination of petitioner concerning prior acts of theft, drug dealing, and dealing in stolen goods; and (4) the alleged prosecutorial misconduct relating to the boiler room photograph and to comments upon petitioner's defense.

Because Daggs and Gomire were part of the conspiracy, and Miller's statements were made in furtherance of that conspiracy (see Gov't C.A. Br. 39-40), those statements were admissible under the co-conspirator exception to the hearsay rule. Further, petitioner's attorneys did not render constitutionally deficient services when they failed to object to the government's cross-examination about petitioner's prior acts of theft and dealing in stolen property. Because such acts reflect on petitioner's honesty (see Fed. R. Evid. 608(b)), counsel may reasonably have believed that an objection would be unsuccessful and would simply highlight the evidence for the jury.

As to the other matters cited by petitioner, even if we assume arguendo that his trial counsel acted unreasonably in failing to make certain objections, petitioner has not demonstrated a "reasonable probability" that the jury would have had a reasonable doubt in the absence of those errors. *Strickland*, 466 U.S. at 695.[6] In fact, the court of appeals determined that the instances of prosecutorial misconduct cited by petitioner, including the conduct to which trial counsel failed to object, did not affect the verdict. Pet. App. A23. Petitioner therefore has not shown that he is eligible for relief under *Strickland*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

LOUIS M. FISCHER
Attorney

AUGUST 1993

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[6] The prosecutor's reference to petitioner's "contrived defense" is better understood as a characterization of the evidence at trial than a statement of the prosecutor's personal opinion. Furthermore, the court of appeals found that the reference to the boiler room in closing argument was not "egregious," particularly in light of the strength of the evidence against petitioner. Pet. App. A22.

No. 92-1910

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MARIANO LETTIERI, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN PETITION FOR WRIT OF CERTIORARI

I. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO OVERTURN THE OUTRAGEOUS DECISION OF THE SEVENTH CIRCUIT SANCTIONING THE USE OF REPEATED, FLAGRANT AND ESCALATING PROSECUTORIAL MISCONDUCT TO OBTAIN A CRIMINAL CONVICTION.

The government has not responded to Petitioner's argument that this case calls for an exercise of this Court's supervisory power to overturn the decision of the Seventh Circuit. Accordingly, Petitioner will stand on the arguments set forth is his Petition for

Writ of Certiorari.

II. THE RULING BY THE SEVENTH CIRCUIT, THAT THE PROSECUTOR'S MISCONDUCT MUST BE SO EGREGIOUS THAT THE JURY WOULD HAVE RETURNED A DIFFERENT VERDICT, CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF EVERY OTHER CIRCUIT.

In our Petition, we allege that the standard of scrutiny adopted by the Seventh Circuit for reviewing the errors at Mario Lettieri's trial conflicts with the standard of review applied by every other federal appellate court in the United States. The government contends, in its brief in opposition, that the Seventh Circuit applied a proper standard of review, noting the court cited Solles v. Israel, 868 F.2d 242 (7th Cir.), cert. denied, 490 U.S. 1101 (1989), as authority for its reduced level of scrutiny. However, Solles involved the review of a habeas challenge to a state court conviction rather than a direct appeal. The court there stated that its

only role was "to protect against error of constitutional dimension." Id., 868 F.2d at 245. The court further recognized "that on habeas review we do not exercise the supervisory powers that we may employ on direct appeal from trials in the federal district courts and, thus, our appellate scrutiny is somewhat constrained." Id. (emphasis added). Thus the Seventh Circuit's reliance on Solles to reduce the level of scrutiny available on direct appeal of a criminal conviction is entirely improper and sets a dangerous precedent.

The government alternatively argues that the Seventh Circuit's level of review was not erroneous because "the court of appeals in this case carefully considered each of petitioner's claims of prosecutorial misconduct and determined that petitioner had not been denied a fair trial." (Govt. Brief at p. 5) The

government is mistaken. In reality, the Seventh Circuit ignored the most egregious episodes of misconduct while it misrepresented and sanitized the remaining episodes.

First, the government contends that the court below "properly held that curative instructions were sufficient to cure the effect of the prosecutor's request that petitioner produce a photograph of his boiler room ... and the prosecutor's closing remark that the jury should send a message by convicting petitioner." (Govt. Br. at pp. 5-6) However, the courts have repeatedly held that mild judicial action, such as instructing the jury to disregard improper argument, is not sufficient to cure the evil caused by inflammatory prosecutorial misconduct. See Berger v. United States, 295 U.S. 78 (1935); United States v. Vargas, 583 F.2d 380, 387 (7th

Cir. 1978). As stated in Berger,

> The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for a stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.

295 U.S. at 85.

The record of Lettieri's trial reveals that the prosecutor improperly asked Lettieri on cross-examination to "[g]o over there [to counsel table] and get the picture [of the boiler room]" knowing that Lettieri possessed no such photograph. Defense counsel objected to the question and asked that it be stricken. The trial court sustained the objection and ruled that the "question is stricken." No curative measures were taken such as instructing the jury that

no negative inference may be drawn from Lettieri's failure to produce this evidence. Similarly, the trial court sustained an objection to the prosecutor's "send a message" argument and ruled that the argument be stricken from the record. Here again and contrary to the government's suggestion, the court took no curative measures such as instructing the jury that "sending a message" to other persons is not a proper reason to convict the defendant. As in Berger, "[i]t is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken."[1]

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[1] The government further contends, in a footnote, that the "send a message" argument was "properly understood as telling the jury to send a message by holding petitioner to the standard of the law." (Govt. Br. at p. 6 n.3) This is patently false. The prosecutor told the jury: "By your verdict of guilty you send a message, not just to these individuals but to all individuals who are out there thinking of doing the same thing."

More fundamentally, the prosecutor's misconduct in demanding that Lettieri produce certain exculpatory evidence (a photograph of his boiler room), was an error of constitutional magnitude because it abridged the defendant's right to remain silent and to be presumed innocent. The prejudicial impact of this error was magnified when, during closing argument, the prosecutor directly argued to the jury that Lettieri's failure to produce this evidence was "[b]ecause he knew there undoubtably is a water heater or something like that right next to the boiler room." This Court has repeatedly held that misconduct which rises to the level of constitutional error must be proven harmless beyond a reasonable

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Regardless of the context in which this argument was delivered, there is no getting around its plain meaning which is to ask the jury to find the defendants guilty in order to send a message to all individuals who are thinking about dealing drugs.

doubt. United States v. Hasting, 461 U.S. 499, 510-11 (1983); Chapman v. California, 386 U.S. 18, 24 (1967). The Seventh Circuit's finding that the first reference to the missing evidence was cured by the district court and that the second reference "was not so prejudicial as to render the trial fundamentally unfair" is in direct contravention of the longstanding principles of Hasting and Chapman. The Seventh Circuit blatantly ignored this Court's mandate that such constitutional errors be proven harmless beyond a reasonable doubt. Indeed, it would be impossible to declare these errors harmless in light of the suspect nature of the proof against Mario Lettieri.

Second, the government contends that the Seventh Circuit properly applied plain error analysis to dispose of Petitioner's claim that the prosecutor

improperly attacked Lettieri's credibility with inflammatory and groundless accusations of prior misconduct. The trial record reveals that, during cross-examination, the prosecutor accused Lettieri, without any basis, of being an outlet for stolen goods and of dealing drugs for a third party not connected with the case. It is well established that a prosecutor may not insinuate that the accused has committed a prior, unrelated offense unless the government is prepared to prove it. United States v. Wolf, 787 F.2d 1094, 1099 (7th Cir. 1986); United States v. DeGeratto, 876 F.2d 576, 586 (7th Cir. 1989) (unsupported accusations "so inflammatory" as to constitute plain error); United States v. Silverstein, 737 F.2d 864, 868 (10th Cir. 1984) (The government is not entitled to use impeachment of the defendant as a "guise

for submitting to the jury substantive evidence that is otherwise unavailable.") Moreover, evidence of prior drug dealing improperly admitted against a defendant in a drug prosecution has been held to be particularly prejudicial. United States v. Vargas, 583 F.2d 380, 388 (7th Cir. 1978); United States v. Martinez, 514 F.2d 334 (9th Cir. 1975). Ignoring the uniquely harmful effect of such improper accusations, the Seventh Circuit merely sweeps these errors under the rug of the harmless error doctrine. The government here contends that Seventh Circuit's treatment of these errors was "correct." This Court should find otherwise.

Next, the government contends, without explanation, that the Seventh Circuit "was justified in its conclusion that no plain error occurred when the prosecutor referred to petitioner's defense as 'contrived.'" (Govt. Br. at

p. 6) However, as we point out in our Petition, the court below ignores the more egregious comment, challenged by Lettieri on appeal, where the prosecutor summons up his own experience to tell the jury that Lettieri's defense is the most contrived "I've ever seen." The government similarly ignores this comment while erroneously asserting that "the court of appeals in this case carefully considered each of petitioner's claims of prosecutorial misconduct ...." (Govt. Br. at p. 5)

Next, the government asserts, again without explanation, that the court below "also correctly found that there was no prosecutorial misconduct, much less plain error, when the prosecutor elicited the terms of a government witness's plea agreement and referred back to that testimony in closing argument." (Govt. Br. at p. 7) However, the government

ignores the fact that Lettieri's claim of improper vouching did not involve the government's eliciting from its witnesses the terms of their plea agreements. The court below has misstated, trivialized and sanitized Lettieri's claim of improper vouching so that it could be more easily disposed of. The government here expresses its approval of this evasion.

In reality, Lettieri has repeatedly challenged the following three incidents of improper vouching for government witnesses:

(1) Testimony elicited from Howard Lucas that the trial judge would determine whether his testimony was truthful, and if the judge determines that his testimony was untruthful Lucas will get "forty years [incarceration] plus some more."

(2) The prosecutor concluded his cross-examination of Lettieri with the following blatant suggestion that the government's witnesses are inherently more credible than Lettieri because they have pled guilty:

Q Mr. Lettieri, you're saying that Michael Gomire and Howard Lucas are lying when they say they picked up narcotics from you, is that correct, sir?

DEFENSE COUNSEL: Objection, your Honor.

THE COURT: That he may answer. Overruled.

A Evidently they are, yes, sir.

Q Now, sir, you understand that they have pled guilty in this case, don't you?

A Yes. From what I understand, they pled guilty to the case.

Q Who's got a greater interest in this case at this time, sir?

(3) The prosecutor's statement during closing argument that Howard Lucas "could get 30 years incarceration if Judge Plunkett deems his testimony untruthful."

In a footnote to its brief, the government contends that United States v. Smith, 962 F.2d 923 (9th Cir. 1992), a case cited by Petitioner, is distinguishable because there "the prosecutor vouched for a government witness and repeatedly staked the

government's and the court's prestige on the veracity of the testimony presented.... In contrast, the court in this case found the prosecutor had not vouched for Lucas's veracity, but merely referred to Lucas's properly admitted testimony that he was required to tell the truth or face perjury." (Govt. Br. at p. 7 n.5; citation omitted)

This response by the government is wholly unsatisfactory and reveals its complete unwillingness to look at the realities of Mario Lettieri's trial in lieu of the sanitized version supplied by the court below. Howard Lucas' plea agreement contains no statement about the trial judge evaluating Lucas' veracity. Thus the references to Judge Plunkett in Lucas' direct examination and in the government's summation clearly went beyond the witness' understanding of his plea agreement. More significantly, the

prosecutor flagrantly vouched for both Gomire and Lucas when he asked the defendant who had the greater interest in the case. As in Smith, by offering this evidence and argument, the prosecutor improperly staked the government's and the court's prestige on the veracity of the testimony presented.

Finally, the government also attempts to save Lettieri's conviction by pointing to the Seventh Circuit's finding that the "strong weight of the evidence was against Lettieri." Therefore, the government argues, this case is unlike Berger v. United States, 295 U.S. 78 (1935), "where the evidence against the defendant '[is] not strong' and the cumulative effect of the prosecutor's misconduct 'cannot be disregarded as inconsequential.'" (Govt. Br. at p. 8) However, the characterization of the evidence against Lettieri as "strong" by

the court below does not make it so. This Honorable Court has the ability and the obligation to make its own evaluation of case against Lettieri.

The Drug Enforcement Administration ("DEA") began investigating Nedrick Miller and the drug operation at the Washington Pines Apartments in late 1987. United States v. Badger, 983 F.2d 1443, 1447 (7th Cir. 1993) (Pet. App. A-3). This investigation continued for more than one year during which time the DEA conducted intense surveillance of the building, tapped the building's telephones, and conducted undercover buys with the help of a confidential informant called Top Cat. (Pet. App. A-3-4) Yet, despite all of its efforts, the DEA did not find one shred of evidence linking Mario Lettieri to the illegal operation.

At trial, DEA agents and police officers gave extensive testimony

describing the drug operation and its participants. However, not one of these witnesses presented any evidence implicating Lettieri in any illegal activity. The government also played a large number of taped telephone conversations obtained from wiretaps of Miller's personal telephone as well as other telephones in his building. Not one of these taped conversations involved Lettieri. Rather, as in Berger v. United States, Mario Lettieri was convicted entirely on the testimony of alleged accomplices with long criminal records, each testifying pursuant to generous plea agreements. Under these circumstances, the willingness of the court below to overlook the possibility that the numerous incidents of prosecutorial misconduct contributed to the verdict is unconscionable.

III. THE SEVENTH CIRCUIT'S RULING THAT THE DEFENDANT HAD NO RIGHT TO CONFRONT OR CHALLENGE THE EVIDENCE UPON WHICH HIS SENTENCE WAS BASED CONFLICTS WITH THE WELL ESTABLISHED CONSTITUTIONAL PRINCIPLES OF DUE PROCESS AND THE RIGHT TO CONFRONT ONE'S ACCUSERS.

The government contends that it was not improper to determine Lettieri's sixteen-year sentence from the hearsay statements of an unavailable witness, Nedrick Miller, because the court below found that "Miller's testimony that petitioner supplied 36 kilograms of cocaine to the scheme was not contradicted by the trial record." (Govt. Br. at p. 8) Here again, however, the fact that the Seventh Circuit found no contradictions doesn't make it so. A fair review of the trial record reveals tremendous inconsistencies between the hearsay proffer and the trial evidence.

First, the hearsay proffer has Lettieri supplying thirty-six kilograms of cocaine to the conspiracy before

Lettieri was even a member of the conspiracy according to the trial evidence. According to government witness Michael Gomire, Lettieri joined the conspiracy in the summer of 1988 when "Miller invited Gomire to participate in a consignment sale of Lettieri's cocaine." (Pet. App. A-3) However, in the hearsay proffer admitted at sentencing, Miller told DEA Agent Riley that he bought thirty-six kilograms of cocaine from Lettieri beginning in late 1987 and continuing for six months. Thus, according to the evidence at trial, Lettieri was not even a member of the conspiracy during the period in which the government alleged he supplied the thirty-six kilos of cocaine. A defendant cannot be held responsible for conduct occurring outside of the time in which he was a willful member of the conspiracy and aware of its purpose. United States

v. Roberts, 881 F.2d 95, 101 (4th Cir. 1989).

Second, the amount of cocaine introduced in the proffer, the most critical piece of information for the determination of sentence, is more than six times greater than the amount of cocaine that the trial witnesses alleged Lettieri supplied. At trial, Michael Gomire, the man in charge of the drug-selling operation, testified that Lettieri supplied a total of three or four kilograms of cocaine to the operation. It is inconceivable that Lettieri could have supplied thirty-six kilograms of cocaine without the knowledge of the man responsible for selling the cocaine.

The government acknowledges in its brief that hearsay is admissible at sentencing only if it is determined to be reliable. Here, the Assistant United

States Attorney admitted, at Lettieri's sentencing, that one of the reasons the government never called Miller as a trial witness was that "he was not completely candid with the government ...." DEA Agent Riley admitted that in an earlier proffer, Miller had stated that he never bought cocaine from Lettieri. For these reasons, the Seventh Circuit's finding that the hearsay proffer has sufficient indicia of reliability to support its probable accuracy is grounded upon fantasy and not fact.

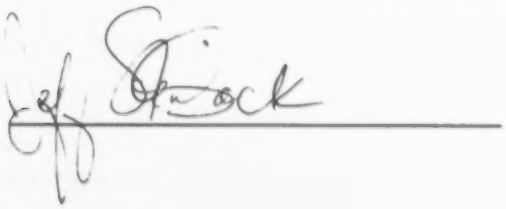
IV. THE SEVENTH CIRCUIT'S FINDING THAT TRIAL COUNSEL WAS NOT CONSTITUTIONALLY INADEQUATE FOR FAILING TO OBJECT TO THE REPEATED IMPROPER ATTACKS UPON THE DEFENDANT AS WELL OTHER DAMAGING EVIDENCE IMPROPERLY ADMITTED, CONFLICTS WITH THE PRINCIPLES ANNOUNCED IN STRICKLAND V. WASHINGTON.

In our Petition, we allege that Lettieri was particularly prejudiced by trial counsel's failure to object to Annette Daggs' hearsay testimony that

Miller told her that a briefcase full of cash was for "Mario" and Michael Gomire's hearsay testimony that Miller told him that a kilogram of cocaine came from "Mario." In response, the government argues that "[b]ecause Daggs and Gomire were part of the conspiracy, and Miller's statements were made in furtherance of that conspiracy, those statements were admissible under the coconspirator exception to the hearsay rule." (Govt. Br. at p. 9; citation omitted) It is well established, however, that hearsay statements which merely inform a conspirator of the ownership of contraband do not further the conspiracy and are not admissible under the coconspirator exception. See United States v. Urbanik, 801 F.2d 692 (4th Cir. 1986) (Coconspirator's statement identifying defendant as the conspirator's "connection" for marijuana

was not made in furtherance of the drug conspiracy and was not admissible under the coconspirator exception to the hearsay rule.); United States v. Bibbero, 749 F.2d 581, 583-84 (9th Cir. 1984). Trial counsel's failure to object to this testimony cannot be excused nor can its prejudicial impact be ignored.

Respectfully submitted,



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